International Brotherhood of Electrical Workers, Local 48, AFL–CIO (Kingston Constructors, Inc.) *and* Patrick Mulcahy. Case 36–CB–2052

December 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 19, 1998, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision and in opposition to the General Counsel's exceptions.[1] Amici curiae National Electrical Contractors Association, Inc. and International Brotherhood of Electrical Workers, AFL–CIO filed a brief in support of the judge's decision.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent Union, International Brotherhood of Electrical Workers, Local 48, AFL–CIO (IBEW Local 48 or Local 48) violated Section 8(b)(1)(A) of the Act by threatening employees with discharge, and violated Section 8(b)(2) by causing and attempting to cause Charging Party Patrick Mulcahy to be discharged, for failing to pay dues under the Union's "market recovery program" (MRP), under which the Union subsidizes the wage rates paid by union contractors on selected projects. For the reasons discussed below, we agree with the judge that Local 48 did not violate the Act by attempting to collect MRP dues that were based on earnings derived from employment on projects that were not covered by the Davis-Bacon Act.[2] We find, however, that the Union violated Section 8(b)(1)(A) by threatening employees with discharge for failing to pay MRP dues owing from their employment on Davis-Bacon projects.

Factual Background

The relevant facts are not in dispute, and are set forth in detail in the judge's decision. Local 48 has a bargaining relationship with the Oregon-Columbia chapter of the National Electrical Contractors Association (ONECA). Numerous members of ONECA and other contractors have assigned their bargaining rights to ONECA. During 1995,[3] the then-current collective-bargaining agreement between Local 48 and ONECA contained a facially valid union-security provision requiring covered employees to become and remain members of Local 48 as a condition of employment.

The Market Recovery Program was inaugurated in 1986 in an attempt to recover for unionized electrical contractors in the Portland area, and for the union members who worked for them, some or all of the market share they had lost to lower wage nonunion firms during the previous decade. Local 48's aim in creating the MRP was to establish a fund, consisting entirely of the Union's money, to promote union electrical construction. The fund would do this principally by paying wage supplements to union contractors on certain projects so that they would be able to bid those jobs on the basis of wage rates lower than the union scale but still be able to pay employees the union rate.[4] Thus, for example, suppose that the contractually established hourly wage rate for union journeymen was $25, but a union contractor was competing for a project with a nonunion firm paying only $20. Rather than submit a noncompetitive bid, the union contractor (after receiving the approval of Local 48) could bid the job on the basis of projected wage costs of $20 an hour but pay his employees $25; the Union would make up the $5 difference out of MRP funds.

The MRP was funded entirely out of dues paid by employees working under Local 48's contract with ONECA. In addition to their basic dues and working dues,[5] employees paid what were styled "additional working dues" equal to 3.5 percent of gross wages into the MRP fund. MRP dues could be paid either through voluntary checkoff, direct payment to the Union, or transfers from the employee's credit union account.[6]

[1] The General Counsel also filed a motion to take administrative notice of certain documents of the U.S. Department of Labor and General Accounting Office. The Respondent filed an opposition. The General Counsel's motion is in reality a motion to reopen the record. Sec. 102.48(d)(1) of the Board's Rules and Regulations requires a party moving to reopen the record to explain why the proffered evidence was not presented previously and that, if adduced and credited, it would require a different result. The proffered documents antedate the hearing in this case, and the General Counsel has neither explained why they were not introduced at the hearing nor shown that they would require a different result. We therefore deny the motion. See, e.g., *Foster Electric*, 308 NLRB 1253 fn.1 (1992).

[2] 40 U.S.C. Sec. 276a et seq. The Davis-Bacon Act requires contractors on federally funded construction projects to pay prevailing area wage rates without deductions or rebates. We discuss the Davis-Bacon Act and its significance for this case below.

[3] All dates refer to 1995 unless otherwise noted.

[4] As the judge found, MRP funds can also be used for related purposes such as advertising and organizing. By far the largest portion of the funds, however, is spent for wage subsidies.

[5] Regardless of their employment status, all members were required to pay "basic dues" of $1.70 each month, plus "working dues" based on their hourly rate of pay during times at which they were employed.

[6] The judge found that the Union had largely abandoned checkoff as a method of collecting MRP dues by 1995. The General Counsel has excepted to that finding. Because this issue has no bearing on our

MRP funds were kept in a separate account from Local 48's general fund. However, the payments into the MRP fund have always been considered to be dues by the Union and have been reported as dues in its annual LM-2 reports filed with the Department of Labor pursuant to the Labor Management Reporting and Disclosure Act.[7]

If an employee became delinquent in paying his dues, including MRP dues, the Union's consistent practice was first to send him a letter informing him of the arrears and advising him that if he did not respond, the Union would ask the employer to discharge him. If the employee still did not make the required payment, the Union would send a "stop work" notice to his employer, with a copy to the employee, requesting that he be discharged.[8] The record establishes that numerous letters of both kinds were sent during the period covered by the complaint.

On June 21, 1995, Charging Party Mulcahy, a member of Local 48, went to work for Kingston Constructors. On June 27, Local 48 sent him a form letter advising him that he was delinquent in his MRP dues in the amount of $377.32. The delinquency arose from an earlier period of employment with Excalibur Electric, which had refused Mulcahy's request to check off his MRP dues. The letter informed Mulcahy that if he did not respond, the Union would send a "stop work" notice to Kingston. Mulcahy did not respond. On July 13, Local 48 sent a "stop work" letter to Kingston, with a copy to Mulcahy, requesting that Mulcahy be discharged for failing to comply with the collective-bargaining agreement. On June 18, Kingston terminated Mulcahy for failing to pay union dues pursuant to the terms of the collective-bargaining agreement. Mulcahy then paid the arrearage and was reinstated at Kingston without actually losing any earnings.

A similar episode took place in October. Mulcahy was working for L.K. Comstock & Co. when Local 48 threatened him with discharge for failing to pay MRP dues while working briefly for Blessing Electric in June. This time, Mulcahy paid the arrearage, and there is no allegation that the Union attempted to have him discharged.

Issues Presented

The General Counsel alleges that the Union violated Section 8(b)(1)(A) by threatening Mulcahy and other employees with discharge, and violated both Section 8(b)(1)(A) and (2) by causing Kingston to discharge Mulcahy, for failing to pay MRP dues. The General Counsel contends that MRP dues are not "periodic dues" within the meaning of Section 8(a)(3) and 8(b)(2) and therefore that the Union and employers cannot lawfully make payment of those dues a condition of employment.

In support of his contention, the General Counsel takes two alternative positions, each of which is based on one of two mutually inconsistent Board decisions on the subject of what kinds of payments can be considered to be "periodic dues." The first of those decisions is *Teamsters Local 959 (RCA Service Co.)*,[9] in which the Board held that the term refers only to payments that are for the purpose of supporting the union in its role as collective-bargaining agent. The General Counsel argues that, if that is the test, MRP dues are not "periodic dues" because they have a narrow, specialized purpose and because they do not support Local 48 in its capacity as collective-bargaining agent.

The other decision is *Detroit Mailers Local 40*,[10] in which the Board rejected any attempt to distinguish between dues allocated for collective-bargaining purposes and those earmarked for the union's institutional expenses. The Board held that dues may be required under a union-security clause "so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy."[11] The General Counsel urges the Board to follow *Detroit Mailers* and abandon *Teamsters Local 959*. He contends that, under the *Detroit Mailers* test, MRP dues are not "periodic dues" that can be lawfully required under a union-security agreement on Davis-Bacon projects. The General Counsel further contends, however, that requiring the payment of MRP dues under a union-security agreement on non-Davis-Bacon projects is not "inimical to public policy," and therefore would be lawful under *Detroit Mailers*.

The judge found that the Board in *Detroit Mailers* implicitly overruled *Teamsters Local 959* and therefore that the *Detroit Mailers* analysis was the appropriate one for assaying the lawfulness of MRP dues. He also found that requiring the payment of MRP dues on non-Davis-Bacon projects was not unlawful. For the reasons discussed below, we agree with those findings.

The judge further found that the issue of the lawfulness of requiring the payment of MRP dues on Davis-Bacon projects was not presented in this case. He reached that conclusion because he found that the General Counsel

decision, we find it unnecessary to pass on the General Counsel's exception.

[7] By contrast, the Union considers other payments, such as jury duty assessments and death benefit assessments, to be assessments rather than dues.

[8] According to the testimony of Local 48's business manager, Gerald Bruce, the Union abandoned this policy in February 1997, and since then has attempted to enforce its dues requirements through civil collection procedures. There is no contention that the Union's actions in this regard were unlawful. Cf. *Scofield v. NLRB*, 394 U.S. 423 (1969).

[9] 167 NLRB 1042, 1045 (1967).

[10] 192 NLRB 951 (1971).

[11] Id. at 952.

had failed to establish a basis for asserting jurisdiction over any contractor identified in the record whose operations may have been affected by the Union's attempts to collect MRP dues on Davis-Bacon projects. As we explain below, we disagree with the judge on the jurisdictional question, and we therefore find that the Davis-Bacon issue is properly before us. On the merits, we find that the Union's attempts to require the payment of MRP dues on Davis-Bacon projects was unlawful.

Analysis

1. Section 8(a)(3) provides that it is unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" The first proviso to Section 8(a)(3) allows an employer and a union that represents a majority of the employer's employees under Section 9(a) to agree to make union membership a condition of employment after an employee has been employed for 30 days. The second proviso to Section 8(a)(3) states that

> [N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 8(b)(2) states that it is an unfair labor practice for a labor organization

> to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 8(f) allows unions and employers in the construction industry to enter into agreements requiring employees, as a condition of employment, to become union members after 7 days on the job, even if the union is not recognized as the majority representative. The first proviso to Section 8(f) states that the second proviso to Section 8(a)(3) shall apply in the case of such agreements. Thus, a union may lawfully cause or attempt to cause an employer to fire an employee who is covered by an 8(a)(3) or 8(f) union-security agreement and who refuses to pay the "periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining [union] membership," and the employer may lawfully comply with such a request.

A question that often arises in cases like this, when a union has sought to compel an employee to make payments to the union on pain of discharge, is whether the payments in question constitute "periodic dues . . . uniformly required." Even when payments are periodic (i.e., ongoing and regularly recurring) and uniform, it is not always clear whether they are "dues," especially if they are earmarked for special purposes. The question has often been couched in terms of whether the payments at issue are "dues" or "assessments"—the latter term seemingly having been used (not entirely helpfully) to mean any payments that are not "dues."[12] The regular and recurring nature of such payments is typical of dues, but their dedication to specific purposes, rather than to the general support of the union, is more suggestive of assessments. In addressing this issue, the Board at times has considered, among other things, whether the union itself deemed the payments "dues" or "assessments" and whether the payments were kept in separate accounts or commingled with revenues from regular dues.[13]

In *Teamsters Local 959*, the Board defined "dues" as funds collected for the maintenance of a union in its role as the employees' collective-bargaining representative. The Board quoted from the Supreme Court's decision in *Radio Officers*:[14]

> The legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

The Board thus reasoned that

> the right to charge "periodic dues" granted unions by the proviso to Section 8(a)(3) is concerned exclusively with the concept that those enjoying the benefits of collective bargaining should bear their fair share of the cost incurred by the collective-bargaining agent in representing them. But it is manifest that dues that do not contribute, and that are not intended to contribute, to

[12] See, e.g., *Food & Commercial Workers Local 1 (Big V Supermarkets)*, 304 NLRB 952 (1991), enfd. 975 F.2d 40 (2d Cir. 1992).

[13] See, e.g., *Anaconda Copper Mining Co.*, 110 NLRB 1925, 1926–1927 (1954); *Carpenters Local 455 (Building Contractors)*, 271 NLRB 1099, 1100 (1984).

[14] *Radio Officers Union (A.H. Bull Steamship Co.) v. NLRB*, 347 U.S. 17, 41 (1954), quoted at 167 NLRB at 1044–1045.

> the cost of operation of a union in its capacity as a collective-bargaining agent cannot be justified as necessary for the elimination of "free riders."[15]

The Board adopted the following distinction between dues and assessments that the Third Circuit drew in *Food Fair Stores*:[16]

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals *for the maintenance of the* organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden *for a special purpose*, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."

Applying that test, the Board held that the payments then in question, which were collected for a credit union and a building fund, were "assessments" and not "periodic dues." Although the payments were regularly recurring, the Board found that they were for a special purpose; they were not for the maintenance of the union as an organization and could be terminated without affecting the union's continued existence as the employees' bargaining agent. The Board therefore found that the union violated Section 8(b)(1)(A) by threatening to enforce those provisions by requesting the employer to discharge employees who did not pay them.[17]

In *Detroit Mailers*, however, the Board expressly disapproved the reasoning in *Teamsters Local 959*. There, the trial examiner had found that the union's pension and mortuary funds and its printers home fund were special purpose funds that were not related to the cost of collective bargaining. He therefore found that payments into those funds were not "periodic dues" that could be required under the union-security agreement. The Board disagreed. Noting that Section 8(a)(3) allows unions to require all employees covered by valid union-security agreements to pay "periodic dues" as a condition of employment, the Board held that

> Neither on its face nor in the congressional purpose behind this provision can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union. As recognized by the Supreme Court in the *Schermerhorn* case, "dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorized the union to do in their interest and on their behalf.'" By virtue of Section 8(a)(3), such dues may be required from an employee under a union-security contract so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy.[18]

Finding that the payments in question were periodic, uniformly required, and not "inimical to public policy," the Board held that the union could lawfully enforce their payment under the union-security clause.

In reaching that conclusion, the Board distinguished *Teamsters Local 959* on its facts but did not explicitly overrule it. Nevertheless, we agree with the judge in this case that *Detroit Mailers* implicitly overruled *Teamsters Local 959*. The rationale of *Detroit Mailers* is obviously incompatible with that of *Teamsters Local 959* and, as we have noted, the Board in *Detroit Mailers* expressly disapproved of the reasoning in the earlier case. We therefore find that *Teamsters Local 959* did not survive *Detroit Mailers* and that the latter decision sets forth the Board's framework for determining whether particular employee payments to unions constitute "periodic dues" within the meaning of Section 8(a)(3) and 8(b)(2).[19]

In any event, we think that the *Detroit Mailers* test is more consistent with the policies underlying Section 8(a)(3) and 8(b)(2) than *Teamsters Local 959*. It is true, as the Board observed in *Teamsters Local 959*, that in enacting the Taft-Hartley amendments in 1947, Congress recognized the potential "free rider" problem that might arise from outlawing the closed shop, and wanted to empower unions to require all employees whom they represented to support the unions financially. Contrary to what the Board said in *Teamsters Local 959*, however, that does not mean that "dues" for purposes of Section 8(a)(3) and 8(b)(2) include only payments that support the union in its capacity as the bargaining agent.

As the Supreme Court held in *NLRB v. General Motors Corp.*,[20] an employee who is represented by a union under a union-security clause does not have to join the union; he need only pay the union's dues and fees. And

[15] 167 NLRB at 1045.

[16] *Food Fair Stores v. NLRB*, 307 F.2d 3, 11 (1962), quoted at 167 NLRB at 1045 (emphasis added by the Board).

[17] 167 NLRB at 1045.

[18] 192 NLRB at 951–952, quoting *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753–754 (1963).

[19] We also think that *Detroit Mailers* implicitly overruled earlier decisions to the extent that they relied on such factors as whether the union regarded payments as dues or assessments and whether the payments in question were placed in separate accounts.

[20] 373 U.S. 734, 742 (1963).

in *Communications Workers v. Beck,*[21] the Court held that a union cannot require a nonmember, over his objection, to pay dues and fees that are not used for collective bargaining, contract administration, and grievance adjustment activities.

Thus, no employee working under a union-security agreement can be compelled to pay the union for anything other than its services as his bargaining representative. To take advantage of that right, however, the employee must either resign from the union or refuse to become a member, and file a *Beck* objection. If he does not choose to be a nonmember *and* object, the union can lawfully charge him full dues and fees.[22] If a nonobjector refuses to pay a portion of those dues or fees, the union may threaten to have him discharged, and may seek and obtain his discharge, without violating Section 8(b)(1)(A) or (2).

Teamsters Local 959 is inconsistent with these principles. Under that decision, a union could not lawfully require even its members to pay dues that did not support the union in its capacity as collective-bargaining agent. As the Union points out, such a rule would obliterate the distinction between members and *Beck* objectors. It would, in substance, allow employees to dictate the terms on which they would be union members. We find nothing in *Beck* to suggest that the Supreme Court had any such result in mind.[23]

In sum, we agree with the Board in *Detroit Mailers* that a union may lawfully require union members, and nonmembers who have not filed *Beck* objections, to pay, as a condition of employment, all dues that are periodic, uniformly imposed, and not devoted to a purpose that is inimical to public policy.[24] *Beck* objectors can be required to pay only the dues that support the union in its capacity as bargaining representative. In a proper case, we may be called on to decide whether payments that support job targeting programs, such as the MRP, can be required of *Beck* objectors. In this case, however, there is no evidence that any employee whom the Union sought to obligate to pay MRP dues under the union-security clause was a *Beck* objector. Mulcahy was a longtime member of Local 48. Union Business Manager Gerald Bruce testified that Local 48 did not represent any *Beck* objectors. The General Counsel has not alleged that *Beck* issues are involved in this case in any way. Thus, we need not and do not decide whether *Beck* objectors can be required to pay MRP dues.

2. We now turn to the question of whether Local 48's MRP dues qualify as "periodic dues" under *Detroit Mailers*. We note initially that there is no contention that MRP dues are not periodic or uniformly imposed.[25] The only question, then, is whether MRP dues are "devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy."

The General Counsel contends that it is not against public policy for a union to collect MRP dues pursuant to a union-security agreement on non-Davis-Bacon projects. He therefore concedes that, under *Detroit Mailers*, the Union did not act unlawfully by enforcing its MRP dues requirement on such jobs. We agree.

The Board has held that "job targeting" programs, such as the Union's MRP program, are not inconsistent with public policy and are affirmatively protected by Section 7.[26] As the administrative law judge in *Manno Electric* stated, "The objectives of the 'job targeting program' are to protect employees' jobs and wage scales. These ob-

[21] 487 U.S. 735 (1988).

[22] The Board has held that "*Beck* rights [including the right to pay only the portion of dues that are spent on representational activities] accrue only to nonmembers." *California Saw & Knife Works*, 320 NLRB 224, 235 fn. 57 (1995), enfd. sub nom. *Machinists v. NLRB,* 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998). See also *Kidwell v. Transportation Communications International Union*, 946 F.2d 283, 292–297 (4th Cir. 1991), cert. denied 503 U.S. 1005 (1992) (holding that an employee under the Railway Labor Act may either belong to the union and pay full dues or elect nonmembership and pay only the portion of dues related to collective-bargaining activities).

[23] The Board decided *Teamsters Local 959* more than 20 years before the Supreme Court rendered its decision in *Beck*. The Board thus was writing at a time when the Court had not yet ruled that nonmembers may object to paying dues for nonrepresentational purposes. Had the Board been informed by *Beck*, it might have reached a different result, or at least adopted a different test, in *Teamsters Local 959.*

[24] We disavow the Board's sweeping suggestion in *Big V Supermarkets* that the Supreme Court in *Beck* implicitly disapproved *Detroit Mailers*. 304 NLRB at 952 fn. 2. In our view, the Court in *Beck* disapproved *Detroit Mailers* only to the extent that, under *Detroit Mailers*, unions could have exacted full dues even over the objections of nonmembers. As the Board noted in *Big V Supermarkets*, *Beck* concerned only nonmember objectors, not union members or nonmembers who have not objected. *Beck* does not, in our opinion, cast doubt on *Detroit Mailers'* holding that unions may lawfully require the latter groups to pay full dues and fees as a condition of employment.

[25] The General Counsel argued to the judge that MRP dues were not uniformly imposed because they are not charged to members who are not working under Local 48's "inside agreement." The judge rejected that argument, and the General Counsel has not repeated it in his exceptions. Indeed, the General Counsel's brief in support of exceptions affirmatively states that "There is no question raised in this case that [MRP dues] are not periodic and not uniform," and that "In applying the *Detroit Mailers* test it is undisputed that the [MRP dues] are periodic and uniformly required of all members." In any event, the Board has held that uniformity exists when, as in this case, payments are required of all similarly situated employees. *Stage Employees Local 409 IATSE (RCA Service Co.)*, 140 NLRB 759, 764 fn. 8 (1963). But see *Electrical Workers Local 357 v. Brock*, 68 F.3d 1194, 1203 (9th Cir. 1995).

[26] *Manno Electric*, 321 NLRB 278, 298 (1996); *Associated Builders & Contractors*, 331 NLRB No. 5, slip op. at 1 fn. 1, J.D. slip op. at 7–8 (2000).

jectives are protected by Section 7."[27] And as the judge in this case noted, Local 48's MRP itself has withstood scrutiny under the antitrust laws.[28] There is no contention here that, on non-Davis-Bacon projects, job targeting programs such as the MRP offend public policy in any respect. We therefore find that collecting MRP dues under a union-security agreement on non-Davis-Bacon jobs is not inimical to public policy, and that the Union did not act unlawfully by attempting to enforce the payment of MRP dues as a condition of employment on such jobs.

3. The General Counsel does contend that the Union violated public policy by requiring the payment of MRP dues as a condition of employment on Davis-Bacon jobs. He cites a decision of the Department of Labor's Wage Appeals Board and two circuit court decisions, all of which held that the collection of dues for such purposes violates the Davis-Bacon Act.[29] The General Counsel reasons that, in light of those decisions, the Union cannot lawfully collect MRP dues on Davis-Bacon projects, and therefore that the Union violated Section 8(b)(1)(A) and (2) by attempting to collect them on such projects under the union-security clause.

As noted above, the judge did not reach the Davis-Bacon issue, because he found that the General Counsel had failed to establish a basis for the Board to assert jurisdiction over any contractor that was involved in a Davis-Bacon project on which the Union had attempted to collect MRP dues. The judge found that the General Counsel had established jurisdiction over Kingston Constructors, which was Mulcahy's employer when Local 48 first threatened him with discharge for failing to pay MRP dues.[30] But although the Kingston project was a Davis-Bacon job, the Union was not attempting to collect MRP dues from Mulcahy arising from his employment with Kingston; instead, the MRP dues were owed for a previous term of employment with Excalibur, on a non-Davis-Bacon job. The judge therefore found, and we agree, that Davis-Bacon was not implicated in those circumstances.

The judge also found that Local 48 had attempted to collect from employees, including Mulcahy, MRP dues that were owing from their employment on Davis-Bacon jobs. However, he further found that the General Counsel had failed (indeed, had not attempted) to show that the contractors for whom those employees had worked on Davis-Bacon projects or for whom they were working when the Union attempted to collect MRP dues from them met the Board's standards for asserting jurisdiction.

The General Counsel has excepted to the latter finding and to the judge's consequent failure to find the collection of MRP dues on Davis-Bacon projects unlawful under *Detroit Mailers*. We find merit in both exceptions.

As the judge observed, the only contractor named in the complaint is Kingston Constructors. Although the complaint alleges that the Union engaged in unlawful conduct with regard to employees of other contractors, it does not identify any of those firms or allege that any of them met the Board's jurisdictional standards.[31] Nor did the General Counsel introduce any evidence with regard to purchases and/or sales of goods and services in interstate commerce by any employer other than Kingston. Thus, although some contractors identified in the record employed individuals on Davis-Bacon jobs, the judge found no basis for asserting the Board's jurisdiction over any of them.

In his exceptions, the General Counsel points out that the issue of jurisdiction was not raised at the hearing or by the Union in its brief to the judge. The General Counsel also argues that, although the issue of statutory jurisdiction may be raised at any time in the proceedings, the issue of discretionary jurisdiction must be raised in a timely fashion,[32] and was not timely raised here.

The General Counsel further contends that, in any event, at least one of the "other" contractors, Tice Electric, met the Board's discretionary jurisdictional standards. Because Tice was one of the contractors that had assigned its bargaining rights to ONECA, the General Counsel argues that it is proper for the Board to assert jurisdiction over all employers that assigned their bargaining rights to ONECA.[33] Certain of those employers

[27] 321 NLRB at 298.

[28] *Phoenix Electric Co. v. National Electrical Contractors Assn*,. 81 F.3d 858 (9th Cir. 1996).

[29] U. S. Department of Labor, Wage Appeals Board, *In the Matter of Building and Construction Trades Unions Job Targeting Programs*, WAB Case No. 90–02 (June 13, 1991), 1991 WL 494718 (WAB); *Building & Construction Trades Department v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994); *Electrical Workers Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995).

[30] The judge stated that "The General Counsel sustained [the burden of establishing jurisdiction] as to acts against Mulcahy when he was employed by [L.K.] Comstock [& Co.]." It is clear from the context of his discussion that the judge was referring to Kingston Constructors, not L.K. Comstock. We correct the inadvertent error.

[31] The Board has jurisdiction whenever an alleged unfair labor practice is found to impose a more than de minimis effect on interstate commerce. *NLRB v. Fainblatt*, 306 U.S. 601 (1939). The Board's standard for asserting jurisdiction over employers in the construction industry is a minimum of $50,000 annual "inflow" or "outflow" of goods and services across state lines. *Siemons Mailing Service*, 122 NLRB 81 (1959).

[32] See, e.g., *Anchortank, Inc.*, 233 NLRB 295 fn. 1 (1977).

[33] See, e.g., *Carpenters Local 102 (Millwright Employers Assn.)*, 317 NLRB 1099, 1101 (1995) (when the collective "inflows" or "outflows" of the employers that have assigned their bargaining rights to a multiemployer association exceed $50,000, it is proper for the Board to assert jurisdiction over any one of them, even without a showing that

employed, on Davis-Bacon jobs, individuals whom Local 48 attempted to require to pay MRP dues as a condition of employment. Therefore, the General Counsel contends, the Davis-Bacon issue is properly before the Board.[34]

We agree with the General Counsel. As the judge noted, for the Board to assert jurisdiction, there must be a showing that the subject matter of the case has more than a de minimis effect on interstate commerce. Normally, that showing is made by proving that the affected employer's operations involve the interstate purchase and sale of goods and services of at least a certain minimum value.

But the Board has also asserted jurisdiction on the basis of other kinds of evidence. In particular, when employers' operations were of sufficiently large size and were supported by substantial amounts of Federal funds, the Board has asserted jurisdiction even in the absence of evidence concerning the interstate inflow and outflow of goods and services. Thus, in *Mon Valley United Health Services*,[35] the employer had gross revenues of more than $1.5 million, of which 45 percent, or some $700,000, came from Federal funds. The Board found that, in view of the combination of gross revenues and the significant amounts that were derived from Federal funds, "the transfer of such funds across state lines constitutes commerce more than sufficient to establish our legal jurisdiction."[36] Similarly, in *Community Services Planning Council*,[37] the Board asserted jurisdiction on a showing that the employer had gross income in excess of $1 million, of which nearly 75 percent was contributed by the Federal Government. In *Bricklayers & Allied Craftsmen, Local 2 (E. J. Harris Construction)*,[38] which involved a construction industry employer, the Board asserted jurisdiction on the basis of the employer's contract for more than $1 million, funded by the Federal Government.

An equivalent showing has been made here with regard to Tice Electric. The record establishes that Tice had a contract for work on the Vista Ridge project that was valued at nearly $1.5 million, of which some $1.3 million, or almost 90 percent, came from Federal highway funds. We find that evidence sufficient to assert jurisdiction over Tice. And because Tice had assigned its bargaining rights to ONECA, we find it appropriate to assert jurisdiction over all employers who had assigned their bargaining rights to ONECA.[39]

Among those employers were L. K. Comstock and Blessing Electric. As we have stated, Mulcahy worked for Blessing for a short time in June. The job on which he was employed was a Davis-Bacon project. In October, while Mulcahy was working for Comstock on another Davis-Bacon project, Local 48 warned him that it would seek his discharge if he did not pay the MRP dues owing from his employment with Blessing. This time, Mulcahy promptly paid the dues. However, because Mulcahy was working for Comstock, as to which we find it appropriate to assert jurisdiction, the Union's threat had more than a de mimimis effect on commerce. And because the MRP dues which the Union sought to collect were owed for Mulcahy's employment on a Davis-Bacon project, we find that the issue of whether Local 48 could lawfully require an employee to pay MRP dues on a Davis-Bacon project, as a condition of employment, is properly before us.

The General Counsel argues that, under the *Detroit Mailers* test, MRP dues based on employment on a Davis-Bacon project cannot be "periodic dues" because their forced exaction on such projects is inimical to public policy. The General Counsel relies on the decision of the Labor Department's Wage Appeals Board in *In the Matter of Building and Construction Trades Unions Job Targeting Programs* and on the courts of appeals' decisions in *Building & Construction Trades Department v. Reich* and *Electrical Worker Local 537 v. Brock*,[40] all of which held that the collection of dues for job targeting programs like Local 48's MRP violates the Davis-Bacon Act. The General Counsel therefore urges us to find that Local 48 violated Section 8(b)(1)(A) and (2) by requiring the payment of MRP dues as a condition of employment on Davis-Bacon projects.

The Davis-Bacon Act provides, in pertinent part, that

> The advertised specifications for every contract in excess of $2,000 to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the

that specific employer satisfied the jurisdictional standard). As the judge found, Kingston was not shown to have assigned its bargaining rights to ONECA, and therefore jurisdiction cannot be asserted over the other ONECA contractors by virtue of Kingston's having satisfied the jurisdictional tests.

[34] The Union does not contest these arguments. It contends that there is no showing that its conduct affected any Davis-Bacon job on which Tice Electric worked. The General Counsel's argument, however, is that Tice met the Board's jurisdictional standards and that, because Tice had assigned its bargaining rights to ONECA, the Board should assert jurisdiction over all contractors who had assigned their bargaining rights to ONECA.

[35] 227 NLRB 728 (1977).

[36] Id.

[37] 243 NLRB 798, 799 (1979).

[38] 254 NLRB 1003 (1981).

[39] *Carpenters Local 102 (Millwright Employers Assn.)*, 317 NLRB at 1101.

[40] See fn. 29, above.

> United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and *without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics[.]*[41] [Emphasis added.]

The implementing regulations, 29 C.F.R. § 3.1 et seq., allow for certain kinds of deductions, including

> *[a]ny deductions to pay regular union initiation fees and membership dues, not including fines or special assessments*: Provided, however, that a collective bargaining agreement between the contractor or subcontractor and representatives of its employees provides for such deductions and the deductions are not otherwise prohibited by law.[42] [Emphasis added.]

Two questions arise concerning the legality of MRP dues under Davis-Bacon. The first is whether dues deducted for job targeting programs, which ultimately are paid to contractors (although not necessarily the contractor employing the employee from whom those dues are collected) are prohibited deductions or whether they fall within the exception for "membership dues, not including . . . special assessments." The second is whether MRP dues, which in this case were not deducted pursuant to contractual checkoff provisions but instead were to be paid directly to the Union, should be considered "deduction[s] or rebate[s]" within the meaning of Davis-Bacon.

In *Building and Construction Trades Unions Job Targeting Programs*, the Wage Appeals Board (WAB) considered a job targeting program under which dues were deducted from employees' pay and remitted to the unions. Thus, the WAB and the D.C. Circuit in *Reich*, which approved the WAB's decision, were faced with only the first of the two questions stated above.

The WAB plurality upheld the determination of the Administrator of the Labor Department's Wage and Hour Division that job targeting programs violate the Davis-Bacon Act. The WAB, like the Administrator, rejected the unions' contention that job targeting dues were "periodic dues" under *Detroit Mailers* and thus constituted "membership dues" that could lawfully be deducted under 29 C.F.R. § 3.5(i). The WAB stated that it could not

> conclude . . . that funds used for the purpose of work acquisition pursuant to a program that would be eliminated if ultimately successful, are "union dues" as that term is ordinarily understood. Like the Administrator, the [WAB] determines that Section 8(a)(3) [of the Act] and relevant case law do not suggest or compel a contrary result.[43]

The WAB also based its decision on the substantive policies of the Davis-Bacon Act and its attendant regulations, which it characterized as "designed to protect the employees' right to prevailing wages, as well as to limit project costs paid by the public." The WAB found that job targeting programs violated both of those principles.[44] It noted that Davis-Bacon requires the payment of prevailing wages "without subsequent deduction or rebate on any account."[45] It further reasoned that

> If funds were deducted for Davis-Bacon projects for use as subsidies on private sector projects, the prevailing wage surveys would be distorted to the extent the subsidy was distributed to any contractor on a private sector project. . . . Over time, the government would pay more on Davis-Bacon and Related Act projects than the actual area wage rate, a result clearly outside

[41] 40 U.S.C. § 276a(a).
[42] 29 C.F.R. § 3.5(i).
[43] 1991 WL 494718 at *6.
[44] Id. at *5.
[45] The WAB also relied on the policies of the Copeland Act, 18 U.S.C. § 874, a criminal statute that prohibits the forced return of wages to employers on Federally funded projects, and on which the Labor Department's regulations are based in part. Although the Administrator held that the job targeting program in question did not violate the Copeland Act, 1991 WL 494718 at *3, the WAB cited the provisions of the Copeland Act as complementary to the Davis-Bacon Act. Id. at *6.

> the public interest and definitely not contemplated by the Congress which enacted Davis-Bacon.[46]

The WAB's decision was upheld by the Federal district court,[47] and the court's decision was affirmed by the D.C. Circuit in *Reich*. The court of appeals found reasonable both the WAB's determination that the deduction of job targeting payments was inconsistent with the literal language of Davis-Bacon and its finding that job targeting programs have the effect of artificially increasing the local prevailing wage rate.[48] The court also found that the WAB's interpretation of its regulations, as excluding job targeting payments from the category of deductible "membership dues," was consistent with the Davis-Bacon principle that wages should not revert to contractors.[49]

Like the WAB, the D.C. Circuit held that *Detroit Mailers* did not compel a conclusion that job targeting payments should be considered "membership dues." The court noted that the Supreme Court in *Beck* held that employees who are not union members may be compelled to pay only the portions of dues that are spent for collective bargaining, grievance adjustment, and contract administration[50] The court thus found that, "even if the NLRA were relevant to the meaning of membership dues in Labor's regulations, recent NLRA case law does not support the unions' argument because JTP deductions would not qualify as periodic dues under that Act."[51]

In 1995, the Labor Department addressed the second question posed above—whether job targeting payments made directly to the union, instead of being deducted from employees' pay and remitted to the union by the employer, would violate Davis-Bacon. The Administrator of the Wage and Hour Division, Maria Echaveste, advised the Building and Construction Trades Department of the AFL–CIO that the Labor Department adhered to the view "that job targeting payments violate the Davis-Bacon Act prohibition against subsequent deduction or rebate . . . as well as the Department's regulations[.]" She went on to say, however, that

> we are also of the view that the Department's scarce resources to enforce the Act should not be utilized where the relationship between the Davis-Bacon deductions and the job targeting project is remote and investigation would be highly resource-intensive. Therefore, the Department will not take exception to the funding of job targeting projects by dues payments in the following situations:
>
> . . . .
>
> 2. Where there are no payroll deductions for dues and employees pay their union dues directly to the union, the union may use the dues to fund a job-targeting program[.]

Thus, although Echaveste stated that the Labor Department would not take action when employees made job targeting program payments directly to the union, she indicated that the Department still took the position that such a program would violate Davis-Bacon.

Later in 1995, the Ninth Circuit in *Brock* took that position unequivocally. In a case in which the union attempted to collect unpaid job targeting dues from employees by means of fines and lawsuits, the court of appeals held that even though the dues were not deducted from the employees' paychecks, but were paid by the employees directly to the union, the program still violated the Davis-Bacon Act.[52] Like the D.C. Circuit, the Ninth Circuit found that the job targeting program was antithetical to the purposes of Davis-Bacon, which were to limit the occasions on which part of employees' wages could be returned to contractors and to prohibit the use of deductions from employees' pay to benefit employers.[53] The court also found that, as with deductions, job targeting payments made directly to unions would tend to distort local prevailing wages.[54] Finally, the Ninth Circuit agreed with the D.C. Circuit and the Labor Department that dues to support a job targeting program were not "membership dues" for purposes of the Department's regulations, and that interpretations of "periodic dues" under the NLRA were not relevant to that determination.[55]

We agree with the General Counsel that, in light of the decisions of the Labor Department and the courts of appeals, requiring the payment of MRP dues as a condition of employment on Davis-Bacon projects is inimical to public policy under *Detroit Mailers*. The Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act. They have concluded that the collection of dues for job targeting programs on Davis-Bacon projects violates the Davis-Bacon Act. Moreover, the Labor Department has indicated, and the Ninth Circuit has expressly held, that even the direct payment of dues for such programs, as opposed to deductions pursuant to checkoff, is unlawful under Davis-

[46] Id.
[47] 815 F.Supp. 484 (D.D.C. 1993).
[48] 40 F.3d at 1280.
[49] Id. at 1281.
[50] 487 U.S. at 745.
[51] 40 F.3d at 1282.
[52] 68 F.3d at 1200.
[53] Id.
[54] Id. at 1201.
[55] Id. at 1203.

Bacon.[56] As a matter of comity we shall defer to those rulings.[57]

The Union and amici contend, however, that those decisions conflict with, and therefore are preempted by, the NLRA. We find no merit in that contention. The Supreme Court in *Southern Steamship Co.*[58] expressly stated that

> the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

The Court reversed the Board and held that a strike on board ship, which violated the Federal criminal statute outlawing mutinies, therefore was unprotected even though it would have been lawful and protected had it taken place almost anywhere else. Clearly, then, we cannot simply hold, as the Union and amici apparently would have us do, that because the collection of MRP dues on Davis-Bacon jobs would otherwise be lawful under the NLRA, any ruling by other agencies or courts that the same conduct violates Davis-Bacon must be preempted as inconsistent with the Act.[59] Were we to do so, we would be announcing, in effect, that the NLRA trumps all other Federal statutes. And that is just what the Supreme Court in *Southern Steamship* said the Board cannot do.

This case differs from *Southern Steamship* in one respect: there, the criminal statute unambiguously prohibited the employees' conduct, whereas here, the Davis-Bacon Act and its regulations do not explicitly address the subject of dues to support job targeting programs. But that is a distinction without a difference, because both the Labor Department and the courts have definitively construed those provisions as prohibiting the collection of such dues on Davis-Bacon projects. The Board has no expertise and no authority on which to base a contrary finding. We therefore are no freer to disregard those rulings than we would be to disregard the language of Davis-Bacon itself, had that language contained the same express prohibition.[60]

As we have stated, then, we shall defer to the rulings of the Labor Department and the courts of appeals. However, we wish to make clear our basis for deference. The Labor Department and the courts relied largely on their findings that job targeting programs are incompatible with the substantive purposes of the Davis-Bacon Act. They emphasized that, in their view, such programs offend Davis-Bacon both by returning a portion of employees' wages to contractors and by tending to inflate computations of prevailing wages. The Board has no institutional expertise or authority with respect to the interpretation of Davis-Bacon, and we therefore have no reason to take issue with those findings or the conclusions flowing from them. We emphasize, however, that in deferring to their conclusion that deductions of the type at issue here violate the Davis-Bacon Act, we are not relying on any construction of "periodic dues" under Section 8(a)(3) that is inconsistent with ours.

[56] That the Labor Department has decided not to "take exception" to job targeting programs in which employees make payments directly to the unions rather than through payroll deductions does not alter our conclusion. The Department evidently took this position because of the administrative difficulty of policing such programs, not because it deemed them to be lawful under Davis-Bacon.

[57] The Board has deferred to other agencies' and courts' authoritative construction of statutes which they have the responsibility for enforcing. See, e.g., *Roseburg Forest Products*, 331 NLRB No. 124 (2000) (deferring to U.S. Equal Employment Opportunity Commission's interpretation of confidentiality requirements under the Americans with Disabilities Act); *PCC Structurals, Inc.*, 330 NLRB No. 131 (2000) (deferring to EEOC's and courts' interpretation of harassment as creating a hostile work environment under the ADA); and *OXY USA, Inc*., 329 NLRB No. 26 (1999) (deferring to the Justice Department's opinion regarding the provisions of Sec. 302 of the Act).

[58] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

[59] This argument, if accepted, would render meaningless the requirement under *Detroit Mailers* that "periodic dues" for 8(a)(3) and 8(b)(2) purposes must not be collected for purposes that are "inimical to public policy." Under this view, arguably any public policy that might be offended by the collection of dues under a union-security agreement would be preempted.

[60] The Union and amici cite *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), in which the court of appeals held that the President's executive order authorizing the Secretary of Labor to disqualify employers that hire permanent replacements for strikers from Federal contracts was preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Machinists Lodge 76 v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976). We find *Chamber of Commerce* to be distinguishable from this case. As the court there found, the executive order was inconsistent with the established NLRA principle that an employer may lawfully hire permanent replacements for economic strikers, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and was based on a statute that did not directly address that issue (or, indeed, labor relations generally). In the Davis-Bacon Act, by contrast, Congress has specifically legislated on the subject of returning portions of employees' wages to contractors. The NLRA is silent on that subject, and until now the Board has not addressed the issue of whether unions may require employees to pay dues that will ultimately be returned to contractors on Davis-Bacon projects. (As we have noted, the Board has found job targeting programs to be protected by the Act. That is not the question here, however. The issue before us is whether unions may lawfully collect dues on Davis-Bacon jobs to support such programs.) Accordingly, the rulings of the Labor Department and the courts are not inconsistent with the NLRA, either as written or as construed by the Board.

For the reasons discussed above, we hold that under the Board's decision in *Detroit Mailers,* payments to support job targeting programs are not "periodic dues" for purposes of Section 8(a)(3) and 8(b)(2) if those payments are based on employment on Davis-Bacon projects, because their forced exaction is "inimical to public policy." We therefore find that the Union violated Section 8(b)(1)(A) by threatening to have employees discharged if they did not pay MRP dues owing from their employment on Davis-Bacon projects. The General Counsel has established that the Union violated Section 8(b)(1)(A) with regard to Mulcahy, when it threatened him with termination if he did not pay his MRP dues owing from his employment on a Davis-Bacon job with Blessing Electric. The complaint alleges that the Union also violated Section 8(b)(1)(A) by issuing similar threats to other, unnamed, employees. The record does not identify any other employees who were similarly threatened with discharge for failing to pay MRP dues owing from Davis-Bacon employment. The record does reflect, however, that a number of employees were threatened during the period covered by the complaint, and the Union stipulated that its practice (until February 1997) was to issue such threats when less confrontational collection methods failed, regardless of whether the dues were owed for employment on Davis-Bacon jobs. In view of these facts, we find that the General Counsel has alleged and proved an 8(b)(1)(A) violation with regard to a class of employees typified by Mulcahy, and we shall issue a class-wide remedy. The members of the class may be identified in compliance proceedings.

On the other hand, the record does not establish that the Union violated Section 8(b)(2) by causing or attempting to cause employers to discharge employees for failing to pay MRP dues owing from their employment on Davis-Bacon projects. Again, the Union stipulated that until February 1997, its practice (when all else failed) was to attempt to have employees discharged for failing to pay MRP dues, regardless of whether those dues were owed for employment on Davis-Bacon projects. As we have found, however, the only time the Union attempted to collect MRP dues from Mulcahy arising from a Davis-Bacon project was when it threatened him in October 1995 for failing to pay MRP dues owing from his earlier employment with Blessing Electric. But there is no allegation, and no evidence, that the Union sought his discharge at that time. Thus, the Union did not violate Section 8(b)(2) with regard to Mulcahy. The complaint does not allege an 8(b)(2) violation with regard to any other employee; it alleges only that the Union violated Section 8(b)(1)(A) by threatening employees with termination for failing to pay MRP dues. And although there are several employees whom the Union attempted to have terminated for failing to pay MRP dues, there is no record evidence that any of those employees owed MRP dues from periods of employment on Davis-Bacon jobs.[61] Because the General Counsel has failed to show that the Union violated Section 8(b)(2) with regard to Mulcahy, and failed either to allege or to prove an 8(b)(2) violation with regard to any other employee, we do not find that the Union violated Section 8(b)(2) within the period encompassed by the complaint.

AMENDED CONCLUSIONS OF LAW

1. Kingston Constructors, Inc., Blessing Electric, Inc., Tice Electric Co., and L.K. Comstock & Co. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union violated Section 8(b)(1)(A) of the Act by threatening to have Mulcahy and other employees discharged pursuant to the union-security provision of the collective-bargaining agreement if they did not pay MRP dues owing from their employment on Davis-Bacon projects.
4. The Union did not otherwise violate the Act as alleged.

REMEDY

Having found that the Union has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we shall order the Union to reimburse Mulcahy and any other employees who paid MRP dues owing from their employment on Davis-Bacon jobs as a result of the Union's threats to have them terminated pursuant to the collective-bargaining agreement if they did not comply with its demands. Reimbursement shall be with interest computed in the manner prescribed in *New Horizons for the Retarded*.[62]

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local 48, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with termination if they fail to make payments to support the Market Recovery Pro-

[61] Although some of the employers who were sent "stop work" letters were involved in Davis-Bacon projects, the record does not show that any of the employees whom the Union attempted to have discharged, other than Mulcahy, ever worked on Davis-Bacon jobs.

[62] 283 NLRB 1173 (1987).

gram (MRP) arising from their employment on projects subject to the Davis-Bacon Act, 40 U.S.C. § 276a et seq.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse Patrick Mulcahy and any other employees who, during the period covered by the complaint, paid MRP dues arising from their employment on Davis-Bacon jobs as a result of the Respondent's threats to have them terminated pursuant to the collective-bargaining agreement if they did not comply with its demands.

(b) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix."[63] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with termination if they fail to make payments to support the Market Recovery Program (MRP) arising from their employment on projects subject to the Davis-Bacon Act, 40 U.S.C. § 276a et seq.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse Patrick Mulcahy and any other employees who, during the period covered by the complaint, paid MRP dues arising from their employment on Davis-Bacon jobs as a result of our threats to have them terminated pursuant to the collective-bargaining agreement if they did not comply with our demands.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48, AFL–CIO

Linda J. Scheldrup, Esq., for the General Counsel.
James W. Kasameyer, Esq. (Carner, Buckley, Kasameyer & Hays), of Portland, Oregon, for the Respondent.
Patrick Mulcahy, pro se, of Gresham, Oregon, for the Charging Party.

DECISION

Introduction to the Case and the Issues It Raises

TIMOTHY D. NELSON, Administrative Law Judge. This is a prosecution brought in the name of the General Counsel of the National Labor Relations Board against International Brotherhood of Electrical Workers, Local 48, AFL–CIO (the Respondent) alleging that the Respondent violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act. I heard the case in trial in Portland, Oregon, on October 21 and 22, 1997, following which counsel for the General Counsel and counsel for the Respondent submitted timely briefs, which I have studied.

The relevant facts are essentially undisputed. The General Counsel attacks the Respondent's admitted practice in the period beginning in "June 1995" (when the first violation under the practice within the 10(b) limitations period is alleged to have occurred) to February 12, 1997 (when the Respondent asserts that it abandoned the practice), of invoking or threatening to invoke discharge rights under a union-security agreement to extract "dues" amounts from member-employees covered by that agreement that were earmarked for a fund administered by the Respondent under its "Electrical Industry Assistance (or Recovery) Program," now usually called the "Market Recovery Program," or the "MRP."

At all times since the uncertain point in 1986 when the Respondent inaugurated the MRP, one of the program's principal aims and functions has been to dispense "wage-supplements" (or "subsidies") on "targeted" jobs to electrical contractors who are signatories to a certain construction labor agreement with the Respondent known commonly as the "Inside Agreement." The Respondent's MRP is not significantly different in purpose or function from other job-targeting programs that are by now

[63] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

so familiar in the building and construction trades that they are usually called, simply, "JTPs." Like the MRP, JTPs in general use such subsidies to enable unionized contractor-beneficiaries to confer on their employees the hourly wages and benefits called for in their labor agreements and at the same time be able to submit bids for a given project that will be competitive with bids submitted by nonunion contractors paying lower rates.

The Board has recently adopted the view that the "objectives" of such JTPs "are to protect employees' jobs and wage scales," and that "these objectives are protected by Section 7" of the NLRA, as are the activities of employees who seek to promote JTPs. *Manno Electric,* 321 NLRB 278, 298 (1996). The Respondent's particular JTP—the MRP—has withstood recent attack as a violation of Federal antitrust laws under the Sherman and Clayton Acts. *Phoenix Electric Co. (National Electrical Contractors Assn., et al.*), 81 F.3d 858 (9th Cir. 1995). In that case, the Ninth Circuit held pertinently (id. at 863):

> Here . . . the parties to this agreement [i.e., the Inside Agreement and the associated MRP that emerged from collective-bargaining between ONECA (infra) and IBEW Local 48] undoubtedly wanted the union subcontractors to increase their work at the expense of nonunion subcontractors. That of course is a legitimate goal of the union and its workers. *Connell [Construction Co., Inc. v. Plumbers & Steamfitters Local 100,]* 421 U.S. [616] at 625 [(1975)]. There is no indication, however, that this agreement is, or ever was intended to be, a bar to competition by nonunion subcontractors, as was the situation in *Connell*. A subsidy program that targets some jobs for more competitive wage components of signatory union subcontractor bids, and does not bar nonunion bidders from bidding on the same jobs, is in harmony with the policies of both the labor and antitrust laws.[1]
>
> . . . .

Although the facts are essentially undisputed, this case raises especially difficult legal questions on at least two levels—at the threshold, as to the Board's jurisdiction to hear and decide some of the counts in the complaint; next, as to the legal merits of the counts over which the Board clearly does have jurisdiction. For reasons elaborated in due course, I will judge that the only alleged unfair labor practices over which the Board has been shown to have both "statutory" and "discretionary" jurisdiction are those associated with Charging Party Mulcahy's treatment at the Respondent's hands while employed by Kingston Constructors, Inc. (Kingston) in June-July 1995. This judgment will not significantly foreshorten my legal analysis, however, for Mulcahy's treatment in that period squarely presents what I regard as the pivotal question in the case—Are MRP dues "periodic dues . . . uniformly required" within the meaning of the NLRA?

The difficulties in deciding the legal merits of this question are manifold: They are traceable in large part to a notorious conflict between the Board's holdings in *Teamsters Local 959*[2] and *Detroit Mailers*[3] on a basic question of interpretation under the NLRA: If a union requires its members to make payments on a "periodic" basis (whether the payments are labeled "dues," "assessments," or something else) that are levied for a "special purpose"—specifically, for a purpose *other* than maintaining the union "in its capacity as a collective-bargaining agent"—is it lawful for the union to seek to collect the special-purpose payments from delinquent members by causing or threatening to cause their employer to fire them pursuant to the terms of a union-security clause in their labor agreement? (In *Teamsters Local 959,* the Board said that the answer to this question is, simply, "No." However, in its later *Detroit Mailers* decision, the Board, without explicitly reversing *Teamsters Local 959,* clearly held that the answer to the same question is "Yes," provided that the purpose for the periodic and uniformly-required payments is not "otherwise inimical to public policy.")

Adding to the difficulty is that the Board has never addressed this question in a case where, as here, the special-purpose "dues" at issue are collected for the *particular* purpose of funding a union's job-targeting program. And further confounding analysis are a series of yet-unresolved issues relating to how, if at all, the Supreme Court's decision in *Beck*[4] might bear on this question, including, not least, the issue of the ongoing vitality of the *Detroit Mailers* holding. (In *Big V Supermarkets*,[5] the Board recognized, but declined to decide, the "difficult question," in the aftermath of *Beck,* whether union-required "payments" for a union's "Organizing Defen[s]e Fund" "constituted periodic dues or an assessment." The Board noted somewhat enigmatically in this regard, however, that, "[o]n the one hand," the *Beck* decision "implicitly disapproved *Detroit Mailers,*" but "[o]n the other hand, *Beck* concerned employees who were not union members, while here the employees are members.")[6]

Considering the array of unresolved legal issues that are only hinted at in this introduction (all of which, moreover, implicate questions of fundamental policy under the NLRA), it doubtless would have been better for this case to have been addressed in the first instance by the Board itself. However, the parties declined my suggestions that they waive decision by the administrative law judge and stipulate to transfer the undisputed factual record directly to the Board for a clearly more authoritative—and ultimately more expeditious—determination of the legal and policy merits.

The peculiar nature and range of these issues is further suggested in the following summaries of the procedural history of

[1] But see *Electrical Workers Local 357 v. Brock,* 68 F.3d 1194 (9th Cir. 1995), further discussed, infra. (JTP "dues" accrued when "traveler"-members of sister local worked on Davis-Bacon projects within Local 357's territorial jurisdiction were prohibited "deduction or rebate"—not "membership dues"—within the meaning of Davis-Bacon Act and certain implementing regulations of Department of Labor described, below.) The Ninth Circuit in *Phoenix Electric* distinguished *Brock* on its facts. 831 F.3d at 859 fn. 1.

[2] *Teamsters Local 959 (RCA Service Co.)*, 167 NLRB 1042 (1960).

[3] *Detroit Mailers Union No. 40 (Detroit Publishers Assn.)*, 192 NLRB 951 (1971).

[4] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[5] *Food & Commercial Workers Local One (Big V Supermarkets)*, 304 NLRB 952 (1991).

[6] Id. at fn. 2. In noting that the *Beck* decision "implicitly disapproved *Detroit Mailers*," the Board referred specifically to the Supreme Court's discussion appearing in 487 U.S. at 752–753, and fn. 7.

the case, the nature of the complaint's central counts, and the main theories of prosecution that inspired those counts:

On January 12, 1996, Patrick Mulcahy, a journeyman electrician and a member of the Respondent, filed a charge with the Portland subregional office of Region 19 of the Board. The charge averred that "on or about July 19, 1995," the Respondent violated Section 8(b)(1)(A) and (2) by "threaten[ing] to cause and caus[ing] Kingston Electric to discharge . . . Mulcahy . . . for reasons other than [his] failure to pay periodic dues and initiation fees as allowed under the National Labor Relations Act." (Mulcahy's charge was based on the never-disputed fact that the Respondent had caused Kingston to fire him briefly, and had done so because he had not paid arrearages in dues amounts earmarked for the Respondent's MRP fund.) Thirteen months then passed before a formal complaint issued. In the meantime, the charge was reviewed by the General Counsel's Division of Advice in Washington, D.C., and then referred back to the Acting Regional Director for Region 19 (the Acting Regional Director) with instructions to issue a complaint.[7] The Acting Regional Director did this on February 13, 1997, 3 days after receiving an amended charge from Mulcahy which transformed the original charge concerning a single transaction in July 1995 affecting only Mulcahy into something resembling a "class" action, i.e, a claim that the Respondent had done the same things it did to Mulcahy in June-July 1995 to an indefinite class of employees working for an indefinite class of employers during an indefinite period of time.[8]

The complaint effectively embraces the amended charge. In its central counts, set forth in paragraphs 5(a) through (f), it makes what amount to four distinct sets of claims:

> (1) The Respondent violated Section 8(b)(1)(A), when, "during June 1995," it "threatened" Mulcahy that it would cause "the Employer" (separately identified in the complaint as "Kingston Constructors, Inc.") to discharge him "for reasons other than [his] failure to tender uniformly required initiation fees and periodic dues" (i.e., for his failure to pay MRP dues-arrearages demanded by the Respondent).
>
> (2) The Respondent violated Section 8(b)(2), and derivatively, Section 8(b)(1)(A), when, between July 17 and July 19, 1995, it made good on this threat by "attempting to cause and caus[ing]" Kingston to discharge Mulcahy, for the same reason.
>
> (3) The Respondent separately violated Section 8(b)(1)(A) when, on October 30, 1995, it again "threatened" Mulcahy with discharge from his then-current job with another (unnamed) "employer[,]" for the same reason.
>
> (4) The Respondent again repeatedly violated Section 8(b)(1)(A) when, "[a]t various times since July 12, 1995 which are currently unknown to the General Counsel," the Respondent also "threatened to cause the termination of other employees from their employment, whose names are currently unknown to the General Counsel[,]" again for the same reason—their failure to pay MRP dues-arrearages—which the complaint characterizes as a "reason other than their failure to tender uniformly required initiation fees and periodic dues."

The language of the complaint clearly expresses a theory of prosecution which supposes at bottom that MRP dues do not qualify as "periodic dues . . . uniformly required" as those terms are used in certain interrelated provisions within Sections 8(a)(3) and 8(b)(2) of the Act.[9] However, the General Counsel's litigation position is unusually delicate and subtle—and in some respects quite shifting and equivocal—as to exactly *why* MRP dues should be found not to qualify as "periodic dues . . . uniformly required." Any discussion of the nuances of the General Counsel's position must await a more detailed narration of the pertinent facts; however, two main features deserve mention at the outset:

First, noting (accurately) that "Board law" is "muddled" when it comes to determining whether special-purpose payments collected from union members on a periodic basis can qualify under the NLRA as "periodic dues," the General Counsel takes the "position" that the Board "should abandon" the *Teamsters Local 959* tests and "should adopt" instead the analysis applied in *Detroit Mailers* "as the *sole test* for determining whether a payment is dues or an assessment."[10] (Exactly why the Board "should" prefer *Detroit Mailers* to *Teamsters Local 959* is a question left unanswered in the prosecution brief. Likewise conspicuously absent is any discussion by the General Counsel of the possible impact of *Beck* on the question of what the Board "should" do, even though, as previously noted, *Beck* "implicitly disapproved" the *Detroit Mailers* holding.)

[7] I was administratively so advised in off-record colloquy with counsel for the General Counsel and counsel for the Respondent.

[8] Mulcahy's amended charge, filed February 10, 1997, reiterated the narrow claim in his original charge concerning the Kingston incident on July 19, 1995, but further averred that, "thereafter," the Respondent "threatened to cause the termination of Mulcahy and others similarly situated . . . for reasons other than [their] failure to pay periodic dues and initiation fees[.]"

[9] In pertinent part, Sec. 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage . . . membership in any labor organization: Provided, That . . . nothing in this Act shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the 30th day following the beginning of such employment or the effective date of such agreement, whichever is later . . . . Provided further, that no employer shall justify any discrimination against an employee for nonmembership . . . if . . . (B) . . . he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

Sec. 8(b)(2) makes it unlawful for a labor organization to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8](a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

[10] G.C. Br., pp. 18, 22, 23 (emphasis added).

Second, in contending that MRP dues do *not* satisfy even the more liberal tests declared in *Detroit Mailers,* counsel for the General Counsel devotes the largest part of her brief to what she calls the General Counsel's "primary" theory—that the *purpose* of MRP dues is "inimical to public policy." The General Counsel is here referring to that "policy" which may be teased from a plurality decision under the Davis-Bacon Act[11] rendered in 1991 by the Wage Appeals Board (WAB) of the United States Department of Labor,[12] a decision which passed review in a United States District Court,[13] and which was ultimately affirmed by the United States Court of Appeals for the District of Columbia Circuit in the *Reich* case,[14] where the D.C. Circuit applied a standard of deference accorded to an agency's interpretation of its own administrative regulations when that interpretation cannot be said to be "plainly erroneous."[15]

The 1991 decision of the WAB—its precise holding and limits, the extent to which it may have been itself influenced by decisions arising under the NLRA, its bearing on questions of interpretation under the NLRA, and especially, its potential for balkanizing the application of the NLRA— might deserve extended discussion in a different case than the one presented here. For present purposes, however, I simply note as follows: The statements variously made by each of the three WAB members whose opinions comprise the plurality decision affirmed in *Reich* invite a variety of interpretations, including even the interpretation that job-targeting "programs" are themselves unlawful under the Davis-Bacon Act. However, I suggest that the strict holding of the decision, as understood and affirmed in *Reich,* was that *employers* on jobs covered by the Davis-Bacon Act, while generally *permitted* under DOL's administrative regulations to *deduct* "regular union . . . membership dues, not including fines or special assessments" from employees' paychecks will nevertheless violate Davis-Bacon proscriptions by *deducting* any such purported "membership dues" amounts that are used by the union to fund *subsidies* to *Davis-Bacon* employers made *pursuant to* the union's job-targeting program.[16] Moreover, the degree to which the Department of Labor currently hews even to *that* understanding of the WAB's holding is cast into doubt by an opinion letter issued on June 20, 1995 by Maria Echaveste, the administrator of the Employment Standards Administration of the Wage and Hour Division of the DOL, to Robert Georgine, the president of the Building and Construction Trades Department of the AFL–CIO—a letter in which Administrator Echaveste identifies two, distinct safe harbors from investigation and prosecution under the Davis-Bacon Act for unions seeking to maintain job-targeting programs funded by the dues of employees working on Davis-Bacon jobs.[17]

[11] 40 U.S.C. A. § 276a, et seq., Sec. 276a provides in pertinent part as follows (my emphasis):

> The advertised specifications for every contract . . . to which the United States . . . is a party, for the construction, alteration and/or repair . . . of . . . public works . . . shall contain a provision stating the minimum wage to be paid various classes of laborers and mechanics, which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing . . . in the city . . . or other civil subdivision of the State in which the work is to be performed . . . and *every contract based upon these specifications shall contain a stipulation* that the contractor . . . shall pay all mechanics and laborers . . . *unconditionally. . . and without subsequent deduction or rebate* on any account, the full amounts accrued at time of payment, computed at wages rates not less than those stated in the advertised specifications[.]

[12] *In the Matter of Building and Construction Trades Unions Job Targeting Programs,* WAB Case No. 90-02 (June 13, 1991), 1991 WL 494718 (WAB).

[13] 815 F.Supp. 484 (D.D.C. 1993).

[14] *Building & Construction Trades Department v. Reich,* 40 F.3d 1275 (D.C. Cir. 1994) (Chief Judge Edwards dissenting).

[15] In affirming the WAB in *Reich*, supra, the D.C. Circuit held ultimately that WAB's "decision that *deductions* that benefit employers are not permissible under Section 3.5(1) [of DOL's administrative regulations] as membership dues is not a plainly erroneous interpretation of its own regulations." 40 F.3d at 1281; emphasis added.

[16] See text quoted in last footnote. Moreover, my characterization of the WAB's strict holding is further supported by the D.C. Circuit's earlier discussions of the background to and the nature of the WAB decision. Thus, as characterized by the Circuit, the issue as originally presented to the Administrator of the Department of Labor's Wage-Hour Division (whose decision was reviewed in turn by the WAB) was "the legality of *deductions* taken from the wages of workers to fund JTPs." The Circuit found that the Administrator "determined" as to this issue that "JTP *deductions* violate prevailing wage rate requirements of the Davis-Bacon Act and are not permissible under either section 3.5 or section 3.6 [administrative regulations promulgated by DOL which permit employer 'deductions' of, inter alia, 'regular union initiation fees and membership dues, not including fines or special assessments'] because such *deductions* benefit employers." 40 F.3d at 1277; emphasis added. Moreover, addressing the WAB decision itself, the Circuit stated as follows (id., emphasis added):

> The [WAB] reasoned that the Davis-Bacon Act requires the payment of prevailing area wages and that Labor's regulations, which generally *prohibit payroll deductions* unless specifically enumerated or approved by Labor, are intended to effectuate that end. While the unions claimed that the JTP *deductions* are authorized under section 3.5(i) as membership dues, the [Wage Appeals] Board concluded that JTP *deductions* are not union membership dues as that term is ordinarily understood.

And see the emphasis on "deductions" (and the distinctions between "deductions" and "direct payments" of dues by employees for purposes of Davis-Bacon enforcement) set forth in Administrator Echaveste's June 20, 1995 opinion letter to the AFL–CIO, quoted in next footnote.

[17] In this letter (GC Exh. 7(b)), Administrator Echaveste told President Georgine, inter alia, that, although "we continue to be of the view that job-targeting payments violate the Davis-Bacon Act prohibition against subsequent deduction or rebate[,] . . . [o]n the other hand

> we are also of the view that the Department's scarce resources to enforce the [Davis-Bacon] Act should not be utilized where the relationship between the Davis-Bacon deductions and the job targeting project is remote and investigation would be highly resource-intensive. Therefore, the Department will not take exception to the funding of job targeting projects by dues payments in the following two situations:
>
> 1. Where dues are deducted from employees' wages and deposited in a general fund which may be utilized for a variety of purposes, union officers may exercise their discretion, from time to time, to utilize the dues for a job-targeting program. Such an exercise of discretion should be authorized pursuant to bylaws or membership resolution. There can be no formal or informal mandate that funds be spent on job-targeting or earmarking of funds for the job-targeting program, nor any formula or mandate requiring that any specific project, class of projects, or number of projects be targeted.

In any case, as I discuss further in my concluding analyses, the General Counsel acknowledges that this "primary" theory applies only to situations where the Respondent may have used job-threats under the union-security clause to collect MRP dues accrued by members when working on jobs covered by the Davis-Bacon Act. As we shall see, however, the General Counsel's primary theory is of dubious application herein. For one thing, the only counts in the complaint that I will find the Board has jurisdiction to adjudicate do not involve the Respondent's use of job-threats to collect MRP dues accrued by a member on a job covered by the Davis-Bacon Act, much less do they involve any attempt by the Respondent to collect such dues through the device of a forced dues-checkoff "deduction" from employees' wages. More fundamentally, the complaint does not charge the Respondent with having unlawfully coerced employees on Davis-Bacon jobs into authorizing their employers to deduct MRP dues from their paychecks, nor does the proof indicate that this was the case. Rather this prosecution attacks the Respondent's invocation of the union-security clause as a device to compel delinquent members to pay MRP dues—period. (Without regard to whether or not the members' delinquencies accrued while working on Davis-Bacon jobs; without regard to whether or not their delinquencies accrued due to their failure to authorize their employers to "deduct" such dues; and without regard to whether or not the members' delinquencies arose due to their employers' refusal to honor dues-checkoff authorizations insofar as the authorizations contemplated the deduction of MRP dues.)

Accordingly, the question raised for adjudication in this prosecution does not ultimately turn on the vagaries of *why* any given member of the Respondent may have become delinquent in the payment of MRP dues, nor even on the fortuities of whether the delinquency did or did not arise on a Davis-Bacon job. Rather, the pivotal question remains, as stated earlier, whether MRP dues are, indeed, "periodic dues . . . uniformly required" within the meaning of the NLRA? For reasons discussed in due course, I will judge that the answer to this question is "Yes"; therefore I will dismiss those counts in the complaint that have survived my jurisdictional dismissals.

Supplemental Findings and Conclusions

I. THRESHOLD JURISDICTIONAL QUESTIONS

A. Governing Principles

It is firmly established as a matter of Constitutional and statutory interpretation that the Board's jurisdiction to hear and decide cases under the NLRA is triggered only when the underlying labor dispute (whether involving a representation issue under Sec. 9, or an alleged unfair labor practice under Sec. 8) may be found to "burden or obstruct" interstate commerce.[18] The Board's statutory jurisdiction under this standard is nevertheless quite broad, indeed it is effectively conterminous with the power of Congress under the Commerce Clause to regulate any activity of an employer or a labor organization which has a greater-than-de minimis impact on commerce between and among the States.[19] But even though "the standard which the Board must meet to establish jurisdiction is extremely liberal, and the Board's jurisdiction extremely broad, 'it is not indeterminate, and must appear from the record; it cannot be presumed.'"[20]

Beyond that, the Board has chosen as a discretionary matter to limit the *exercise* of its statutory jurisdiction to labor disputes that are shown to have a "substantial" impact on interstate commerce, and has more particularly defined that notion by establishing minimum interstate "inflow" or "outflow" volumes—themselves varying according to the character of the business done by one or more employers involved in or affected by the particular matter before the Board.[21] Where, as here, a labor organization is the target of a complaint alleging violations under Section 8(b)(1)(A) and/or (2), the jurisdictional inquiry focuses on the employer or employers whose operations are shown to have been affected by the union's allegedly unlawful acts.[22] And where, as here, the alleged unfair labor practices implicate the operations of construction industry employers engaged in "nonretail" business activities, the Board requires proof that such affected employers participate, "directly" or "indirectly," in a stream of commerce involving an annual "outflow" or "inflow" across state lines of goods or services worth more than $50,000.[23]

B. Application to this Case

Kingston Constructors, Inc. (Kingston) is identified in the complaint as "the Employer." Kingston is also the only employer specifically identified in the complaint as having been affected by the Respondent's alleged unfair labor practices. (The other counts in the complaint have to do with actions of the Respondent affecting the employees of "other," unidentified employers, an indefinite class which I will sometimes refer to below as the "other employers.") And only Kingston's opera-

2. Where there are no payroll deductions for dues and employees pay their union dues directly to the unions, the union may use the dues to fund a job-targeting program—without regard to whether a portion of the dues is earmarked for job targeting.

[18] Sec. 1 of the Act, stating its "Purposes and Policies," reveals that Congress, pursuant to its powers under the Commerce Clause, intended to prevent certain employer and union practices that "have the intent or the necessary effect of burdening or obstructing commerce." See also, *NLRB v. Fainblatt*, 306 U.S. 601 (1939), and *NLRB v. Reliance Fuel Co.*, 371 U.S. 224 (1963).

[19] *Fainblatt*, supra, 306 U.S. at 606–607; *Reliance Fuel Co*., supra, 371 U.S. at 226.

[20] *NLRB v. Peninsula Assn. for Retarded Children*, 627 F.2d 202, 203 (9th Cir. 1980), quoting *NLRB v. E.L. Clark*, 468 F.2d 459, 466–467 (5th Cir. 1972). See also *Clark Concrete Construction Corp.*, 116 NLRB 321 fn. 3 (1956) (a finding that the Board has statutory jurisdiction is necessary in all Board proceedings, even though no party contests that jurisdiction), and *Anchortank, Inc.* 233 NLRB 295 fn. 1 (1977) (statutory jurisdiction can be challenged at any stage).

[21] See generally, *Siemons Mailing Service,* 122 NLRB 81 (1959).

[22] See, e.g., *Carpenters Local 102 (Millwright Employers Assn.),* 317 NLRB 1099, 1101 (1995), and authorities cited; *Hotel & Restaurant Employees Local 595 (Arne Falk),* 161 NLRB 1458, 1461–1462 (1966); and *IBEW Local 257 (Osage Neon Plastics),* 176 NLRB 424 (1969).

[23] *Siemons Mailing*, supra, 122 NLRB at 85. And see, e.g., *Millwright Employers Assn*., supra.

tions are described in the "jurisdictional" pleadings in the complaint, which allege (at par. 2) as follows:

> (a) Kingston . . . is a State of California corporation, with office and place of business in Burlingame, California[,] where it is engaged in the business of electrical construction.
>
> (b) [Kingston], during the past 12 months, which period is representative of all material times, in the course and conduct of its business operations, purchased and caused to be delivered to its facilities within the State of California, goods and materials valued at in excess of $50,000 directly from sources outside said state, or from suppliers within said state which in turn obtained such goods and materials directly from sources outside said state.
>
> (c) [Kingston] has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At the trial, the Respondent amended its answer to admit these allegations. Accordingly, I find that the Board's statutory and discretionary jurisdiction are established over the Respondent's alleged unfair labor practices insofar as they were shown to have affected Kingston's operations by virtue of its role as Mulcahy's employer at the time of those alleged unfair practices. However, for reasons discussed next, I am unable to conclude on this record that the Board has jurisdiction over any of the other counts in the complaint, all of which involve alleged actions affecting employees of employers *other* than Kingston, i.e., the counts set forth in paragraphs 5(d) and (e) of the complaint.[24]

The complaint does not identify those "other" employers, nor does it allege facts about their operations which, if admitted or otherwise proved, would permit me to find that any of those employers have an impact on interstate commerce. Not only is the complaint silent on the point but the General Counsel has not in any other way addressed the question of the Board's jurisdiction over alleged violations affecting these "other" employers. In the circumstances, I question at the start whether it is even appropriate for a judge to rummage through the record to ascertain whether, despite the General Counsel's inattention to the issue, there might exist both facts and a theory on which to predicate a finding that the Board has jurisdiction to adjudicate the "other" alleged violations. Nevertheless, I have done just that; and although I have traveled down several paths in search of evidence and a theory that might yield such a finding, I have reached nothing but dead-ends at every turn. What follows is a summary of the fruits of my explorations:

The trial record incidentally identifies a relative handful of employers who were specifically shown to have been implicated to some debatable degree in the Respondent's alleged "other" violations in the period "since July 12, 1995," the period during which the "other" violations are alleged to have occurred. I refer specifically to Blessing Electric, Inc., Tice Electric Co., Team Electric Co., and L.K. Comstock & Co. (Blessing was shown to have been Mulcahy's employer for about 3 days in early June 1995, for which stint Mulcahy did not pay MRP dues, for which delinquency the Respondent is alleged to have unlawfully threatened Mulcahy (on October 30, 1995) with discharge under the union-security clause, at a time when he was shown to be working for L.K. Comstock. Tice and Team were shown to have been employers of a "traveler" named Paul Benston in the period August-December *1996,* during which employment stints Bentson had likewise accumulated MRP dues-delinquencies, for which the Respondent, in January *1997,* threatened Bentson with a Stop-Work notice, at a time when Benston was working for an unidentified employer.) However, the identification in the record of three of these four contractors—Blessing, Tice, and Team—would seem to be wholly irrelevant to the jurisdictional question because these employers were not shown to have been the employers of the named employees at the time of these alleged "other" violations, and thus their operations were not shown to have been in any meaningful way *affected by* the alleged "other" violations. More important, even if the operations of these three contractors were somehow deemed to be relevant to the jurisdictional issue, the record contains no evidence about their individual or collective impact on commerce. Moreover, in the case of L.K. Comstock, whose operations *were* arguably affected by the Respondent's Stop-Work notice against Mulcahy on October 30, 1995, the record likewise contains no evidence that Comstock's operations satisfied any applicable jurisdictional test.

The record also indicates that the four contractors previously named were, by virtue of their inclusion in a list of contractors set forth in General Counsel's Exhibit 2, among those who have "assigned the[ir] bargaining rights" to the Oregon-Columbia Chapter of the National Electrical Contractors Association (ONECA), and who were also "signator[ies]" to the Inside Agreement negotiated between ONECA and the Respondent.[25] However, for jurisdictional purposes, this information is again merely tantalizing, because even assuming that these few identified "other" employers have, by assigning their bargaining rights to ONECA, composed themselves so as to permit consideration of their collective impact on commerce,[26] the record

[24] The counts in pars. 5(d) and (e) are the ones I enumerated as (3) and (4) in my previous summary, to wit: (3) The Respondent violated Sec. 8(b)(1)(A) on October 30, 1995, by "threaten[ing]" Mulcahy with discharge from his then-current job with another (unnamed) "employer" for non-payment of MRP dues amounts; and (4) the Respondent likewise violated Sec. 8(b)(1)(A) when, "[a]t various times since July 12, 1995 which are currently unknown to the General Counsel," the Respondent also "threatened to cause the termination of other employees from their employment, whose names are currently unknown to the General Counsel."

[25] Testimony of ONECA's attorney, Van Cleave, associated with the admission of G.C. Exh. 2 into evidence.

[26] See, e.g., *Stack Electric,* 290 NLRB 575, 576–577 (1988), where the Board held that if the collective "outflows" or "inflows" of employers who have commonly assigned their bargaining rights to a multiemployer association exceed $50,000, this will justify asserting jurisdiction over any one of them, without regard to whether or not the employees of the employer-members of the association comprise an appropriate multiemployer bargaining unit, and even when the single employer targeted by the complaint was not shown to satisfy the impact-on-commerce test. See e.g., *Millwright Employers*, supra, 317 NLRB at 1101; *Bufco Corp.*, 291 NLRB 1015, 1016 (1988).

still contains no information about their individual or collective annual "inflows" or "outflows" across state lines.

Neither can *Kingston's* proven "inflows" and "outflows" be used as a bootstrap to establish the Board's common statutory and discretionary jurisdiction over alleged unfair labor practices affecting these "other" employers, for Kingston was not shown to have been a member of ONECA, much less to have delegated its bargaining rights to ONECA.[27] Indeed, if the record implies anything meaningful in this respect, it is that Kingston's apparent status as an employer bound to the Inside Agreement arose entirely outside the auspices of ONECA.[28] The Board's recognition that participants in a multiemployer bargaining arrangement may be bound to action of the group representative is predicated on the consent of the parties to such a result. *Marty Levitt,* 171 NLRB 739 (1968); *Evening News Assn.,* 154 NLRB 1494 (1966), affd. sub nom. *Detroit Newspaper Publishers Assn.,* 372 F.2d 569 (6th Cir. 1967). And see *James Luterbach Construction,* 315 NLRB 976, 977 (1994) (employer has statutorily-conferred "right to eschew multiemployer bargaining" absent "clear and unmistakable manifestation of consent to be bound" thereby). It cannot be assumed that Kingston's apparent "mere adoption" of the Inside Agreement negotiated by ONECA made Kingston part of any multiemployer unit of ONECA contractors that may otherwise exist. *Gordon Electric Co.,* 123 NLRB 862 (1959); *Greater Syracuse Printing Employers' Assn.*, 140 NLRB 217 (1963). Similarly, even though Kingston was shown itself to satisfy statutory and discretionary requirements for assertion of jurisdiction, Kingston's mere adoption of an agreement that also binds other employers is not sufficient to invest the Board with jurisdiction over alleged unfair labor practices affecting those other employers.

In addition, I have considered the possibility that certain facts in the record might enable an argument for the assertion of *statutory* jurisdiction over the operations of Comstock, because Comstock was shown to have been working on a "Federal Davis-Bacon job" on October 30, 1995, when the Respondent, seeking MRP dues accrued by Mulcahy during his previous employment by Blessing on a Davis-Bacon job in early June, effectively threatened to have Mulcahy fired by Comstock under the terms of the union-security agreement. Thus, the fact that Comstock and Blessing (most importantly, Comstock—because its operations alone could be said to have been affected by the Respondent's allegedly unlawful threat against Mulcahy on October 30, 1995) were subject to the provisions of the Davis-Bacon Act might conceivably be invoked as a basis for finding that the Board has at least statutory jurisdiction over the Respondent's alleged violations affecting them. See *Catalina Island Sightseeing,* 124 NLRB 813 (1959) (Board has statutory jurisdiction over employer because employer was shown to be subject to regulation under the Commerce Clause by another Federal agency). However, I judge that any such arguments would themselves be quite problematic,[29] and even if resolvable in the prosecution's favor, could not carry the day in the absence of evidence that Comstock (or any other employer identified in the record as having been genuinely *affected by* "other" alleged unfair labor practices), satisfied *discretionary* tests.[30]

In sum, the record does not affirmatively show that the operations of *any* of the "other" employers who may have been affected by the Respondent's alleged post-July 12, 1995 unfair labor practices satisfy either the statutory or discretionary prerequisites to the Board's exercise of jurisdiction to decide the merits of those alleged unfair labor practices. Lacking such affirmative evidence, I am not entitled to presume that any of those other employers satisfy these jurisdictional requirements. The General Counsel bore the burden of persuasion on the question of the Board's jurisdiction over allegedly unlawful acts of the Respondent. The General Counsel sustained that

[27] Kingston is not one of the contractors listed as an "IBEW/NECA contractor" on G.C. Exh. 2, which, as previously noted, is an exhibit introduced by the prosecution through witness Van Cleave to show which ONECA members *were* not only "signatory contractors" to the Inside Agreement, but also had "assigned their bargaining rights to [ONECA]." If Kingston had been shown to have unambiguously delegated its bargaining rights to ONECA, then, under the authorities cited in the last footnote (and the further authorities cited below in main text), the proof that Kingston individually satisfied statutory and discretionary jurisdictional tests would be enough to establish jurisdiction over alleged unfair labor practices by the Respondent affecting *any* of the "other" contractors who were shown to have "assigned their bargaining rights to ONECA." But Kingston was not shown to have delegated bargaining rights to ONECA; rather, as I note elsewhere below, the record implies at most that Kingston regarded itself somehow as *bound* to the Inside Agreement. But this fact is itself inconclusive: Certainly, nothing in the terms of that agreement suggest that an employer bound to it is even a *member* of ONECA, much less that the employer-signatory has delegated bargaining rights to ONECA. (The Inside Agreement recites simply that it is "by and between [ONECA] and [the Respondent]," and that it "shall apply to all firms who sign a Letter of Assent to be bound by this agreement.")

[28] As already noted, Kingston is not listed on G.C. Exh. 2 as an employer-signatory to the Inside Agreement, and thus Kingston was not shown to have delegated its bargaining rights to ONECA. Moreover, the pleadings establish that Kingston is a California corporation with business headquarters in Burlingame, California, and there is no evidence that Kingston had a regular "presence" in the Portland area. Rather, so far as this record shows, Kingston's work on the "Westside Light Rail Project" (where it employed Mulcahy in June-July 1995) represented its only business foray into the Portland area.

[29] It is doubtful at the threshold that the Davis-Bacon Act represents an exercise by Congress of powers *under the Commerce Clause* to "regulate" interstate commercial activity, as distinguished from merely constituting an exercise incidental to its *spending* powers under the Constitution, i.e., as declaring the "prevailing-wage" conditions that must be satisfied before Congress will permit the commitment or payment of Federal funds for any "public works" project. And in this regard I note that although the NLRA clearly reveals at Sec. 1, supra, a Congressional intent to exercise regulatory powers under the Commerce Clause, the Davis-Bacon Act appears to contain no counterpart expression of such intent.

[30] Even if the Davis-Bacon Act were construed to be an act of "regulation" of commercial activity done under the authority of the Commerce Clause, the record still fails to show that the operations of any of the identified "Davis-Bacon" employers satisfied the Board's discretionary standards for jurisdiction. Nor do I regard myself as empowered to "waive" discretionary jurisdictional requirements established by the Board. Rather, it would be for the Board, which has the discretionary authority in the first instance to put limits on its exercise of statutory jurisdiction, to waive those limits in a given case.

burden as to acts against Mulcahy when he was employed by Comstock. However, as to counts in the complaint involving alleged wrongdoing against Mulcahy or "other" employee-members when they were employed by "other" employers, the General Counsel developed no coherent body of evidence in support of that burden, nor did the prosecution advance any argument as to how or why on this record it could be found to have carried that burden.

In all the circumstances, therefore, I judge finally that the prosecution has not carried that burden as to those "other" counts. Accordingly, I summarily dismiss the counts set forth in paragraphs 5(d) and (e) for want of proof of jurisdiction, and my findings and discussion hereafter will focus primarily on facts relevant to the legal merits of only those counts that were shown to satisfy impact-on-commerce tests, i.e., those counts that relate to Charging Party Mulcahy's experiences at the Respondent's hands while employed by Kingston in June-July 1995.

II. THE MATERIAL FACTS IN OVERVIEW

Applicable Contract Provisions and "Monthly Dues" Requirements

On June 21, 1995,[31] Mulcahy, a journeyman electrician and member of the Respondent, began working for Kingston on what the parties stipulated was a "Federal Davis-Bacon project." As elaborated in the next section, the Respondent caused Kingston to fire Mulcahy about 3 weeks later, because he was delinquent on the payment of "Market Recovery dues" that he had accrued during an earlier stint of employment for Excalibur Electric, on a job that the parties stipulated was not a "Federal Davis-Bacon" job. As further described below, Market Recovery dues, or MRP dues, had been part of the Respondent's "monthly dues" structure since early 1986, when, based on circumstances and implementational details described elsewhere below, the MRP was inaugurated.

In June-July 1995 Kingston regarded itself as bound to the terms of the Inside Agreement,[32] the labor agreement negotiated between ONECA and the Respondent which apparently covered the work done by the largest share of the Respondent's members.[33] The Inside Agreement contained, at article II, section 2.03.02, a facially lawful union-security agreement for the construction industry requiring covered employees, after a 7-day grace period,[34] to become and remain "members" of the Respondent.[35]

In June-July 1995, the Respondent's bylaws required (at art. X, sec. 7(a)) that "members" pay "monthly dues" according to a variable schedule which expressly included an amount earmarked for the MRP fund from members who worked under the Inside Agreement. Thus, under the variable dues schedule, all members, regardless of their employment status, were required to pay "basic dues" each month of $1.70. In addition, members were required to pay "working dues" in amounts that varied depending on their hourly pay rate (from as little as $3.30 per month if the member earned less than $4.24 per hour, to as high as "1% of 160-hour gross wages" if the member earned $8.75 per hour or more). Most significantly for our purposes, section 7(a) provided further that "[m]embers working under the terms of the Inside Construction Agreement" must pay "additional working dues of 3.5% of gross wages to fund the Local Union 48 Electrical Advancement Program,"[36] the same program now more commonly called the MRP.

The MRP dues obligation specified in the bylaws facially applied to *all* "members" who worked under the Inside Agreement. (Although the record is vague on the point, it may be

[31] All dates below are in 1995 unless I say otherwise.

[32] There is no direct evidence that Kingston was a signatory to the Inside Agreement or that it had signed a Letter of Assent to bind itself to that agreement. However, Kingston's written communications to Mulcahy and to the Respondent, discussed infra, make reference to "Article II, paragraph 2.03.03" of "the agreement," and, in context, this was clearly a reference to the union-security provisions of the Inside Agreement.

[33] The record vaguely indicates that the Respondent also maintains at least three other labor agreements with employers other than those electrical construction firms that are bound to the Inside Agreement: These include a "Residential Agreement," apparently covering an uncertain number of employees involved in electrical installations on residential construction projects; a "Sound and Communications (or "Low-Voltage") Agreement," apparently covering a smaller group of employees whose work is confined to the installation and maintenance of systems for telephones, intercoms, and other electronic communication devices using "low voltage"; and a "Marine Agreement," apparently covering another small unit of workers who install and maintain electrical systems on boats and ships. The record does not indicate, however, whether ONECA is a party to any of these other agreements.

[34] Where, as here, the labor relationship arises in the building and construction industry, the superseding provisions of Sec. 8(f) of the Act allow union-security clauses to provide a 7-day grace period for acquiring or retaining union membership, rather than the 30-day period specified in Sec. 8(a)(3). Thus, Sec. 8(f) states pertinently that "[i]t shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because . . . (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment[.]"

[35] The complaint does not allege, and the General Counsel does not otherwise contend, that the Respondent has failed to notify employees of their rights under *General Motors*[*], as clarified in *Beck*, supra, to refrain from becoming "full members" of the Respondent and to decide instead to become obligated to the Respondent only to the extent of paying those dues amounts necessary to support the Respondent in its role as their collective-bargaining representative.[**] Because such questions were not raised—much less were they litigated—I cannot assume that the Respondent has been derelict in this regard.

[*] *NLRB v. General Motors Corp.,* 373 U.S. 734, 742 (1963).

[**] And see *California Saw & Knife Works,* 320 NLRB 224, 231 (1995) (union seeking to apply union-security clause to unit employees has general "fair-representation" duty to notify employees of *General Motors/Beck* rights before they become subject to obligations under the clause), and *Paperworkers Local 1033 (Weyerhauser Paper Co.),* 320 NLRB 349, 350 (1995) (union duty to notify employees of *Beck* rights includes duty to so notify current members if they did not receive such notice when they entered the bargaining unit).

[36] As further noted below, the bylaw language just quoted has been in existence since 1992, and represents a modification of similar language that had been in the bylaws since the 1986 inception of the MRP.

that, in practice, first-year apprentices in a "probationary" status were exempted from paying MRP dues even if they worked under the Inside Agreement, but it likewise appears that, in practice, the Respondent did not admit any first-year apprentices to "membership.")[37] In addition, at least in the June-July 1995 period that directly concerns us, the record shows that MRP dues were also required of all "travelers" (IBEW members who maintained "home local" membership in a local other than the Respondent) who performed work covered by the Inside Agreement within the Respondent's territorial jurisdiction.[38] Finally, contrary to some suggestions in the General Counsel's brief, members working under the Inside Agreement were the *only* members of the Respondent who were obligated *under the bylaws* to pay MRP dues. (It vaguely appears from the record that members working under the "Residential Agreement" also were participating in some manner in the MRP—or perhaps in "an MRP program" similar to "the" MRP.[39] But if so, the Respondent's bylaws are silent as to their obligations to pay MRP dues, and it remains unclear in any case whether any MRP dues being paid by members working under the Residential Agreement were being paid into the same MRP fund as the fund that received MRP dues from members who worked under the Inside Agreement.)

Recognizing that in cases like this the Board sometimes seems to place partial reliance on the "fortuities" of the "terminology" a union uses to describe a disputed levy,[40] I further note as follows: The bylaws clearly show that the Respondent drew a distinction between "dues" and "assessments," and that it regarded MRP dues as "monthly dues," distinct from any "assessments" the Respondent might also impose on its membership. Thus, the requirement for MRP dues appearing in article X, section 7(a) is preceded by an opening clause which states, "The monthly dues shall be based on the member's hourly wage rate as follows:" And the distinction between "monthly dues" and "assessments" is made even more apparent in subsection (b), which provides that "[a]pplicable International per capita and *all assessments* [are] to be paid *in addition to* the above dues." Id. (emphasis added).[41] Therefore, although the record plainly shows that the Respondent treated MRP dues as "special-purpose" dues, it is equally clear that the Respondent still regarded MRP dues as part of its "periodic dues" structure, and not as "assessments."

Recognizing that the General Counsel, for reasons never clearly articulated, somehow finds the Respondent's dues-checkoff practices to be relevant to this case, I further find as follows: At all times since the MRP's 1986 inauguration, the "Union Dues" section of the Inside Agreement (Art. III, sec. 3.06.03) has contained the following provision:

> The Employer agrees to deduct and forward to the Financial Secretary of Local Union 48, upon receipt of a voluntary written authorization, dues and assessments from the pay of each IBEW member. The amount to be deducted shall be the amount specified in the approved Local Union Bylaws. Such amount will be certified to the Employer by the Local Union upon request by the Employer.

ONECA's attorney, Richard Van Cleave, and the Respondent's current business manager, Gerald Bruce, testified harmoniously that this contractual language first appeared as part of the "overall agreement" reached by those parties that resulted in the Respondent's inauguration of the MRP. These witnesses agree that, until that time, ONECA had always op-

[37] Bruce testified generally that "apprentices in their first year. . . don't contribute to market recovery" because they are regarded as "probationary." This present-tense testimony does not clearly indicate, however, that the same exemption was applied to first-year apprentices in June-July 1995. At least as important, it is not evident on this record that the implied "exemption" for first-year apprentices was, in reality, a genuine exemption from the "monthly dues" provisions otherwise binding on all "members," for the record fails to show that the Respondent admits any first-year apprentices to "membership." And if first-year apprentices were not "members," it would be irrelevant for our purposes that they may not have been required to pay the MRP dues required of "members" who worked under the Inside Agreement. Indeed, after studying relevant provisions in the Respondent's bylaws and the IBEW Constitution, I am inclined to interpret Bruce's testimony as implying that, in practice, apprentices were *not* admitted to membership until the completion of a 1-year probationary period. Thus, art. XV, sec. 2 of the Respondent's bylaws, dealing with the admission of "apprentices" to membership, provides that "[a]pprentices *may* be accepted into membership at any time" (emphasis added), but further mandates that "they shall be admitted to membership in accordance with Article XVI of the IBEW Constitution." And art. XVI of the IBEW Constitution provides pertinently (at sec. 14) that "after . . . an apprentice has worked 1 year in the jurisdiction of the L[ocal] U[nion], he shall be admitted into the IBEW, through the L.U. without further action by the L.U." In any case, I emphasize that the "monthly dues" section of the bylaws does not affirmatively acknowledge *any* exemption for first-year apprentices who may be "members."

[38] The Respondent's bylaws provide at art. X, sec. 1, that "[m]embers of other IBEW Local Unions employed in the jurisdiction of this Local Union shall pay applicable working dues as provided in these bylaws." (See also similar language at art. X, sec. 7(d), following the identification of MRP dues as "additional working dues.") Parsing of the bylaws aside, the Respondent acknowledges that it treated these provisions in June-July 1995 as requiring travelers who worked under the Inside Agreement to pay MRP dues. Indeed, Bruce testified that it was only in response to the Ninth Circuit's (October 20, 1995) decision in *IBEW Local 357 v. Brock,* 68 F.3d 1194, that the Respondent stopped trying to collect MRP dues from travelers working on Davis-Bacon jobs who "objected" to paying such dues on such jobs.

[39] Van Cleave and Bruce commonly testified in summary terms that, sometime in 1987, members working under the Residential Agreement voted to "participate" in the MRP and began to pay MRP dues. At p. 22 of the prosecution brief, counsel for the General Counsel appears to rely on this testimony when she states (in the nature of a concession, considering the context) that "members working under the Residential Agreement" were also "required" to pay MRP dues. But at p. 4 of the same brief, counsel for the General Counsel, apparently mindful of the same ambiguity in this testimony that I have suggested, states (my emphasis), "as of about a year or so after MRP started, employees working under the Residential Agreement voted to participate in an MPR [sic] program."

[40] See discussion in *Pacific Northwest Newspaper Guild v. NLRB*, 877 F.2d 998, 999, and fn. 2 (D.C. Cir. 1989). See e.g., *Teamsters Local 959*, supra, 167 NLRB at 1042, 1044.

[41] In addition, see art. X, sec. 1: "All assessments imposed in accordance with the IBEW Constitution and these bylaws must be paid within the time required to protect the member's continuous good standing and benefits." See also, id.: "Members shall not be required to pay assessments for welfare benefits in which they cannot participate."

posed any dues-checkoff arrangement. However, it is not certain that the Respondent had ever previously sought a dues-checkoff clause, for Bruce testified that it was historically too complicated for employers to do the calculations required to determine the "working dues" any given member might owe in any given month. Consequently, says Bruce, the Respondent had always billed its members directly for their basic dues and working dues, and members either paid these amounts "at the window" at the union hall, or authorized their credit union or bank to deduct and transmit the billed dues amounts from their private accounts. Indeed, says Bruce, even after the dues-checkoff clause became incorporated into the Inside Agreement in 1986, the employers who received signed authorizations from employees to deduct union dues and assessments[42] would apply these authorizations only to their MRP dues amounts, which, as Bruce noted, was a fixed percentage of earnings on the particular job, and therefore simple for employers to calculate. In addition, states Bruce, even after the dues-checkoff language was included in the Inside Agreement, the Respondent continued to use traditional, direct-billing procedures to collect basic dues and other working dues amounts from its members.

It is evident from the foregoing testimony that the parties' main reason for including dues-checkoff language in the Inside Agreement in and after 1986 was to facilitate collection of the MRP portion of the dues owed. However, it further appears that, by 1995, the Respondent had long since abandoned the dues-checkoff authorization as a reliable vehicle for collecting MRP dues—especially when member-employees accrued such dues while working on Davis-Bacon jobs. Thus, 4 years before this case arose, and in reaction to the 1991 WAB decision, *supra*, ONECA had instructed its "members" and other "signator[ies]" to the Inside Agreement that they should "no longer deduct the union dues for market recovery from any employee's wages on Federal Davis-Bacon projects[,]" further advising that employees "can go to the local union and pay directly or have their credit union account increased to the appropriate amount."[43] As a consequence, apparently long before Mulcahy started with Kingston in late June 1995, a substantial number of contractors bound to the Inside Agreement (perhaps "most" of them, as the General Counsel interprets the record[44]) were no longer deducting MRP dues from employees' wages, especially not when they worked on Davis-Bacon jobs, not even when presented by employees with the Respondent's standard dues-checkoff form. And as a further consequence of these 1991 events, as I understand Bruce's testimony, the Respondent itself had reverted to direct-billing procedures to collect *all* dues owed—including MRP dues— from members working under the Inside Agreement.[45]

III. MULCAHY'S TREATMENT BY THE RESPONDENT IN JUNE-JULY 1995

Mulcahy knew when he started with Kingston on June 21 that he had not paid any MRP dues accrued when he had worked for Excalibur on a non-"Federal-Davis-Bacon" job earlier in the spring of 1995. Upon becoming employed by Excalibur, he had tendered the standard dues-checkoff form, but Excalibur had refused to deduct any MRP dues amounts from his paycheck.[46] Mulcahy then had protested in some manner to the Respondent, and one of the Respondent's business agents, Grant Zadow, had visited the Excalibur jobsite and told Mulcahy that he owed the MRP dues without regard to Excalibur's refusal to honor his checkoff authorization. Also, at some point before June 23—probably before Mulcahy began working for Kingston on June 21—Mulcahy had received a set of dues-billing notices from the Respondent, indicating that he owed a "grand total" of $317.73 linked to his prior employment by Excalibur.[47] The notices specified that $316.61 of that total reflected "Market Recovery Dues Owing," and that the remaining balance of $1.12 was owed for "PAC."[48]

[42] At all material times the Respondent's standard checkoff form, when signed by an employee, authorized the employer to deduct and transmit to the Respondent "all Union dues and assessments including initiation fees and reinstatement fees in the amount certified to by the Business Manager of Local Union 48."

[43] These instructions are set forth in a letter dated June 21, 1991, from ONECA to its members and other contractors signatory to the Inside Agreement. ONECA also stressed in this 1991 letter that its instructions applied "only on Federal Davis-Bacon jobs," and that the State of Oregon has determined that dues deductions for market recovery on State Davis-Bacon is allowable."

[44] G.C. Br. at p. 6.

[45] Bruce's testimony is ambiguous on a marginal question: In the aftermath of the 1991 WAB decision and ONECA's instructions to its contractor-affiliates, did the Respondent (a) revert *exclusively* to direct-billing to collect MRP dues owed by members in addition to the "basic dues" and other "working dues" amounts that were already being collected by direct-billing? or (b) simply use direct-billing to collect MRP dues accrued on *Davis-Bacon* jobs, while continuing to rely on the dues-checkoff process to collect MRP dues accrued on non-Davis-Bacon jobs? Considering that the Respondent was already using direct-billing to collect "basic dues" and "working dues" other than MRP dues, the latter possibility strikes me as a highly improbable one because of the obvious administrative headaches (special accounting, employee-tracking, partial billing) that would necessarily attend any such bi-level process of collection.

[46] This suggests, consistent with earlier findings, that, by 1995, even employers on non-Davis-Bacon jobs were balking at honoring dues-checkoff authorizations insofar as they contemplated deduction of MRP dues amounts.

[47] These billing notices (GC Exh. 10(a)) are undated, but they specify that the amounts in question were linked to Mulcahy's previous employment by Excalibur, and that the amounts were "due by 6/23/95." I infer from this latter text that the notices were received by Mulcahy well before the specified due-date, probably before June 21, when he started working for Kingston.

[48] Two points are worth noting regarding this "PAC" amount: First, Bruce testified without contradiction that there are no "*Beck* objectors" among the Respondent's constituency. Second, the parties stipulated as follows: "The issues litigated in this case do not include PAC assessments and the letters reflecting such assessments are not to be construed as raising an issue to the [*sic*] effect in this case. The parties agree that such an issue was not pled in the Complaint."

It was the evident intent of the parties to this stipulation—and the General Counsel has not suggested otherwise on brief—to exclude from this prosecution any possible challenges to the lawfulness of the Respondent's attempts to collect "PAC" assessments from its members. Accordingly, I will devote no further attention to any such questions.

On June 27, when Mulcahy was now employed by Kingston, the Respondent's then-business manager, Edward Barnes, dispatched a standard-form letter to Mulcahy advising him that the Respondent's "records covering wages and fringe benefits through May 95 show a delinquency of $377.32 for the 3.5% 'Market Recovery' dues."[49] (The parties stipulated that the delinquency referred to in this letter was based on hours Mulcahy had previously worked for Excalibur.) The letter further threatened that if Mulcahy did not "respond," the Respondent would send a "'Stop Work' notice" to your employer."

On July 13, after Mulcahy still had not paid the Excalibur-related MRP dues-delinquency, Barnes mailed the threatened "Stop Work notice" to Kingston, and also mailed a copy of that notice to Mulcahy. In pertinent part, the notice stated:

> We hereby request the termination of [Patrick Mulcahy] as he . . . has failed to comply with the collective bargaining agreement between your firm and Local Union 48 IBEW. We ask that this Stop Work request become effective 48 hours from your receipt.

On July 18, Kingston, in turn, told Mulcahy in a written memorandum that the Respondent had requested his termination and had advised Kingston that the reason was Mulcahy's failure "to pay union dues per Article II, paragraph 2.03.03 of the Union Agreement." And by a separate notice bearing the same date, Kingston advised the Respondent that it had "discharged" Mulcahy "[a]s directed by IBEW Local 48 per terms of agreement Article II, paragraph 2.03.03."

Apparently referring to these same documented transactions, but using an inconsistent date and a misleading verb, the parties stipulated that "[o]n July 19 [*sic*], 1995, Patrick Mulcahy was issued [*sic*] a Stop Work Order but did not lose any pay and returned to work later the same day after payment was made to the Local Union." I regard the apparent discrepancies between the stipulation and the documentary evidence as immaterial. In reliance on the documentary record as otherwise supplemented by this stipulation, I find that Kingston discharged Mulcahy on July 18 (perhaps at the end of the workday), then reinstated him (on the morning of July 19, apparently), after he had paid the Excalibur-related MRP dues-delinquency, and before he had suffered any loss of wages from his employment with Kingston.

Although the foregoing findings are sufficient in my view to permit adjudication of the lawfulness of the Respondent's treatment of Mulcahy in June-July 1995, I make these additional findings on matters of arguable relevance to that same issue: The undisputed record clearly shows that the Respondent's actions against Mulcahy in June-July 1995 were not unique, but rather were taken as part of a more general dues-enforcement program that governed until February 12, 1997, when the Respondent began to resort exclusively to "civil-collection" procedures to recover any MRP dues or other dues from delinquent members.[50] Thus, the parties stipulated more generally that,

> At all times material herein prior to February 12, 1997, Local 48 widely publicized its policy of invoking the union security clause, including the threat of discharge, if any member failed to pay all dues owed to Local 48, including Market Recovery monies, owing for work performed within the jurisdiction of Local 48, including any Federal Davis Bacon jobs. Thereafter, Local 48 widely publicized its change in policy regarding dues delinquency enforcement as set forth in GC Exhibit 15.[51]

Relatedly, the parties further stipulated, in substance, that the sequential billings, warnings, and Stop-Work notices the Respondent used in Mulcahy's case were illustrative of the paperwork and procedures the Respondent used generally to collect supposed dues-delinquencies from members at all material times before February 12, 1997.[52]

---

[49] The General Counsel has disclaimed any contention that by this or other prior notices the Respondent may have independently violated its "fiduciary duties" under *Philadelphia Sheraton[*]* to give Mulcahy appropriate "notice" of his delinquencies and an "opportunity to cure" them before seeking his discharge. Accordingly, that question is not before me.

[*] *NLRB v. Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton),* 320 F.2d 254, 258 (3d Cir. 1963), enfg. 136 NLRB 888 (1962). See also *Communications Workers Local 9509 (Pacific Bell),* 295 NLRB 196 (1989), where the Board stated, "Under *Philadelphia Sheraton*, a union seeking to enforce a union-security clause against an employee has a fiduciary duty to deal fairly with that employee. This requires that before a union may seek the discharge of an employee for the failure to tender owed dues and fees, it must at a minimum give the employee reasonable notice of the delinquency, including a statement of the precise amount and months for which dues are owed and of the method used to compute this amount, tell the employee when to make the required payments, and explain to the employee that failure to pay will result in discharge."

[50] Although it doesn't affect the merits, I note as a matter of historical interest that the Respondent's wholesale switchover to a civil-collection policy occurred only after the General Counsel authorized the complaint in this case and only a day before the Acting Regional Director issued that complaint.

[51] GC Exh. 15 is a copy of the Respondent's newsletter to its members announcing the new civil-collection policy, under the headline, "Local 48 Gets Tough On Dues."

[52] Because I judge that the Respondent was legally privileged in exercising rights under the union-security clause of the Inside Agreement to collect MRP dues-arrearages from Mulcahy when he was employed by Kingston, it is unnecessary to decide whether the Respondent's publicized February 1997 switchover to a civil-collection policy truly reflected an abandonment of job-threats as part of its collection program. However, if my judgment that the Board's jurisdiction is limited to consideration of the alleged unfair labor practices against Mulcahy while employed by Kingston were reversed, I note as follows regarding one lingering feature of the Respondent's post-switchover collection program: The parties stipulated that even under the changed program, the Respondent continued to send a "delinquency-dues notice" used under the former program which contains a plain job threat in its boilerplate, stating (my emphasis), "Unless a payment is received on or before [date and time] you will be suspended and required to pay a reinstatement fee of [amount] *in order to continue working*." Bruce testified, however, that the job-threat implicit in the form's boilerplate did not reflect the Respondent's actual collection policy after February 12, 1997, and he explained that reasons of simple economy caused the Respondent to continue using the standard delinquency-notice form containing this language until supplies ran out.

IV. THE MARKET RECOVERY PROGRAM

A. The Employer-Subsidy Arrangement

As previously noted, what is now usually called the Market Recovery Program was called in its early stages the "Electrical Industry Advancement [or "Recovery"] Program." Although employer subsidies are not the only feature of the MRP (the evidence, discussed infra, shows that "promoting the organized electrical construction industry" is the broader charter of the program as it was approved by the Respondent's membership in November 1985), the subsidies are a central feature, and deserve a brief description.

The subsidy arrangement contemplated from its inception that a contractor bound to the Inside Agreement facing competitive bids for a given job from one or more nonunion contractors could apply to the Respondent for an MRP subsidy for that job in an amount that would effectively permit the subsidized employer to pay wage and benefit contributions from its own pocket that were lower than those called for under the Inside Agreement, with the MRP subsidies used to ensure that electricians on the subsidized job would nevertheless receive the actual rates prescribed by the Inside Agreement. In the first year of the program's operation (1986–1987), the Respondent paid this subsidy directly to employees on the subsidized job, but after the first year, the Respondent began paying the subsidies directly to the employer-applicant in a gross amount linked to its certified payroll, and the employer then used these moneys to help it pay employees at the rates and other terms prescribed in the Inside Agreement. And it was this latter practice that prevailed at all times material to *all* alleged unfair labor practices in this case, including those I have found the Board is without jurisdiction to adjudicate.

B. Origins of and Reasons for the MRP

The MRP was born in 1985–1986, when ONECA members bound to the Inside Agreement were facing significantly increased competition from nonunion contractors who paid lower hourly wages to their workers than those prescribed in the Inside Agreement. In fact, according to the harmonious accounts of Van Cleave and Bruce, in the previous decade, ONECA members had lost a substantial share of the electrical construction market in the Portland area to nonunion contractors; and, as a closely related consequence, the Respondent's regular membership working under the Inside Agreement had plummeted to about 800 from a one-time high of about 1700. (According to Bruce, many of the Respondent's regular members formerly working under the Inside Agreement had become "travelers" in the meantime, seeking work in the trade in other regions of the country.)[53]

[53] These same witnesses affirm that in the 11 years since the MRP was implemented, the subsidy feature of the MRP has caused a dramatic upswing in employment opportunities for both unionized electrical contractors and for the Respondent's constituents; indeed, Bruce testified that the Respondent currently has about 2000 members—plus another 1000 or so travelers—working within its jurisdiction, and that it cannot find enough out-of-work electricians to satisfy the requests of employers seeking to use its hiring-hall and referral services.

This crisis loomed over the Respondent's and ONECA's midterm renegotiations of the Inside Agreement's wage provisions, a contractually contemplated process that apparently began sometime in 1985 and continued at least into April 1986, at which latter point, according to Van Cleave, "the initial [MRP] program was agreed to." Although matters of precise timing and sequence during this period remain uncertain, the main developments associated with that renegotiation process were as follows:

In the early stages of the renegotiations, ONECA demanded wage-reductions of $5 per hour to enable its employer-members to compete with the nonunion firms. The Respondent rejected wage-givebacks, but in recognition of the underlying problem, it proposed instead the job-targeting, or wage-subsidy program that became the MRP. ONECA agreed in principle to the Respondent's counterproposal, but only after researching the potential antitrust implications of such an arrangement and then getting the Respondent's promise that all such subsidies would come exclusively from the Respondent's treasury, and would be paid for by "union dues" placed in a fund to be administered exclusively by the Respondent. Both Van Cleave and Bruce further testified, credibly, that the employer subsidies, although central to the MRP, would not be the only uses for the Respondent's MRP fund. Rather, these witnesses agree (and language in the membership Resolution discussed next supports them) that the understanding from the start was that MRP funds would also be used to support the Respondent's "advertising" and "organizing" programs.

C. The Respondent's Implementation and Administration of the MRP

The parties may well have reached these agreements in principle sometime before November 2, 1985, for it was on that date that a majority of the Respondent's members voted by secret ballot in favor of a Resolution enabling the Respondent to fund just such a program through a "special-dues" increase. Key provisions of the Resolution were as follows:

> 1. That our Local will create and fund a program to be known as the Electrical Industry Recovery Program. . . whereby a fund will be created consisting exclusively of our Local's money which will be used for the exclusive purpose of promoting the organized electrical construction industry within the jurisdiction of Local 48 by such means as wage supplements on certain jobs (by which employees on a job for which a lower rate has been negotiated will be reimbursed by the Program), advertising, educational programs, productivity studies, and related activities.
>
> 2. That the Program will be funded by the payment of special dues by all employees working under the Inside Agreement in an amount equal to 3-1/2% of their gross earnings, which special dues shall be in addition to the working dues currently being paid.
>
> 3. That the assets of the Program shall be maintained in a separate account designated as the Electrical Industry Recovery Program (I.B.E.W. Local Union 48).
>
> . . . .
>
> 6. That in the event the Program is terminated by the Business Manager and the Executive Board, the special

> dues will immediately cease and all questions relating to the liquidation of the assets of the Program, including the possibility of a refund on some fair basis to the contributors, will depend on the circumstances then existing and will be resolved by the Committees in their sole discretion.

Consistent with this resolution, in July 1986, the Respondent amended the "Monthly Dues" provisions in article X, section 7(a) of its bylaws to provide that "[m]embers working under the terms of the Inside Construction Agreement shall pay additional 3.5% of gross wages." In 1992, however, the Respondent amended and expanded this provision to read as follows, with emphasis on changes from the July 1986 bylaw language:

> Members working under the terms of the Inside Construction Agreement shall pay additional working dues of 3.5% of gross wages *to fund the Local Union 48 Electrical Advancement Program. Said Fund shall be separate from the General Fund but shall be audited at the same time and in the same manner as prescribed under Article XI. No other moneys shall be transferred from the General Fund to the EIAP without prior approval of the International President.*

As previously noted, it was this latter bylaw language that governed when the Respondent, invoking rights under the union-security clause, used Mulcahy's job with Kingston as a lever to collect from Mulcahy the MRP dues that he had accrued while working previously for Excalibur.

Consistent with the quoted bylaw provision and the underlying membership Resolution, the Respondent at all material times has placed MRP dues in a separate bank account from the account (or accounts) in which it maintains its "General Fund[s]." However, for purposes of its required annual "LM-2" report to the United States Department of Labor under the Landrum-Griffin Act, the Respondent does not segregate MRP dues from other "dues"-receipts, but rather includes them in a single total of "dues" received during the reporting period.

In addition, although the Respondent's bylaws prohibit "transfer" of moneys in the general fund to the MRP fund, nothing in the bylaws (nor in the enabling membership Resolution) prohibits the transfer of moneys from the MRP fund into the general fund, nor the use of MRP moneys to support activities of the Respondent that do not involve subsidy payments to employers. In fact, as previously noted, the membership Resolution broadly authorized the "creat[ion] and [fund[ing] of a program" wherein the Respondent's "money . . . will be used for the exclusive purpose of *promoting the organized electrical construction industry* . . . by *such means* as wage supplements on certain jobs . . . advertising, educational programs, productivity studies, *and related activities*." And Bruce's undisputed testimony makes clear that the Respondent has construed this charter quite broadly, as authorizing MRP funds to be used to support the Respondent's "organizing" activities in general. Thus, Bruce testified that MRP funds have been used not just for subsidies and subsidy-related bookkeeping, administration, and "overhead" costs, but also to pay "the "salaries of the [Respondent's] three [full-time] organizers." In addition, Bruce testified that MRP funds are used for such organizing purposes as supporting employees working on the Respondent's behalf in various "salting" campaigns.[54]

V. ANALYSES, CONCLUSIONS, ORDER

A. General Principles

Under established interpretations of the dovetailing provisions of Sections 8(a)(3) and 8(b)(2), when a union and an employer are parties to a lawful union-security agreement (i.e., an agreement requiring as a condition of employment that employees become or remain "members" of the union), and when "membership" in the union entails a duty to pay "periodic dues and initiation fees," the union may lawfully demand that the employer discharge an employee who has failed to tender such dues or fees to the union after receiving notice and opportunity to cure the delinquency.[55] It is equally settled, however, that when a union imposes charges or "assessments" *other than* "periodic dues and initiation fees" on its members or other employees who may be covered by a union-security agreement, any such other charge, "even if levied legitimately, must be collected without impact on employment rights or tenure."[56]

Plainly, therefore, the pivotal issue in this case is whether MRP dues qualify as "periodic dues. . . uniformly required" within the meaning of Sections 8(a)(3) and 8(b)(2). If they do, then the Respondent's actions against Mulcahy while employed by Kingston in June-July 1995 were legally innocuous. If they don't, then it must be found that the same actions against Mulcahy were unlawful.[57]

B. "Periodic Dues" vs. "Assessments": Confusions and Contradictions in the Caselaw

As noted, when a union imposes a requirement of membership that includes a duty to pay levies that cannot be categorized as "periodic dues . . . uniformly required" under the NLRA, the union cannot lawfully invoke rights under an otherwise valid union-security clause to coerce employees (whether or not they are "members" of the union) into paying such levies (or "assessments"—the conclusionary term the Board usually reserves for any levies that it has already found do not qualify as "periodic dues").

---

[54] According to Bruce, MRP funds were used to support, *inter alia,* the Respondent's salting campaign that became the subject of *Tualatin Electric,* 312 NLRB 129 (1993).

[55] See, e.g., *Green Team of San Jose,* 320 NLRB 999, 1004–1005 (1996).

[56] *Operating Engineers Local 542C (Ransome Lift)*, 303 NLRB 1001, 1003 (1991), citing *Associated Fur Mfrs*., 280 NLRB 922 (1986).

[57] Moreover, even if, contrary to my judgment, it were determined that the Board has jurisdiction to adjudicate the other counts in the complaint attacking the Respondent's actions against employees of "other" employers in the period after July 12, 1995, it remains clear that the merits of those alleged violations would likewise hinge on the question whether MRP dues properly qualify as "periodic dues . . . uniformly required." The only difference in such event might be that the analysis under *Detroit Mailers* could be complicated by the "public-policy" implications of the 1991 WAB decision—an issue I have found unnecessary to decide because of my dismissal of the pertinent counts on jurisdictional grounds, and in any case an issue that the Board is better-suited to decide in the first instance.

How can you tell whether the disputed levy belongs in the pigeonhole for "periodic dues" rather than the slot for "assessments?" The answer to this taxonomic question is fairly simple when the levy is clearly a "one-time," or "temporary" charge, for such levies necessarily lack the threshold statutory requirement of "periodicity," and they are therefore mere "assessments." [58] Indeed, in such cases, it doesn't matter whether the union (or the Board) prefers to call the disputed amounts "dues," "assessments," or something else; the important disqualifying feature is that such levies do not call for "periodic" payment. As I discuss next, however, the answer is less easy to discern from the cases when the disputed levy apparently satisfies the threshold requirement of periodicity; for it is precisely in those cases that "Board law," is, indeed, "muddled" by a hodgepodge of approaches which have in common only that they involve inquiry, to one degree or another, into the "purpose" for the disputed levy, even while being inconsistent as to exactly which purposes will or will not qualify the periodic levy as "periodic dues."

The General Counsel states on brief, with substantial justification in the caselaw, that "current Board law on this issue finds its genesis" in distinctions originally posited by the Third Circuit in *NLRB v. Food Fair Stores,* 307 F.2d 3, 11 (1962), as follows (emphasis added):

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals *for the maintenance of the* organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden *for a special purpose*, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."

These "distinctions" may be vulnerable to attack at the threshold as involving a certain definitional circularity. They are debatable on several other levels, as well. First, they appear to presuppose that there "clear[ly]" exists a "usual and ordinary sense" about what "periodic dues" means. This presupposition may be illusory: The expression is hardly one that is part of the "usual and ordinary" phraseology of the union movement or of the unionized workplace; rather the phrase appears to be strictly a creature of Congress itself. [59] Much less is it obvious that Congress shared the Circuit's belief about the "usual and ordinary" meaning, if any, of the expression *periodic dues*. Equally debatable is any supposition that the underlying taxonomic question can be helpfully resolved by reference to what Congress knew or may have assumed about the "purpose" behind the longstanding practice followed by unions of collecting "dues" at regular intervals from their members.[60] Nevertheless, the Board embraced the Third Circuit's distinctions in *Teamsters Local 695*, supra, and did not expressly or implicitly disavow them in *Detroit Mailers,* supra, nor in any later case that I can discover. Accordingly, these distinctions must inform my further analysis.

The Third Circuit's distinctions in *Food Fair* certainly imply that a lack of periodicity will alone doom the purported "dues" amount to consignment to the category of a mere "assessment." However, the passage as a whole (and without the emphasis that I placed on certain phrases, supra) does not obviously imply the validity of a quite different proposition—that a "special purpose" for the disputed levy will alone cause it to be treated in law as an "assessment," even if it is due and owing on a "periodic" basis. (The circuit's reference to a "special purpose" does not stand alone, but is itself modified by an appositional clause ". . . a special purpose, *not having the character of being susceptible of anticipation as a regularly recurring obligation*[.]") Nevertheless, in *Teamsters Local 959,* the Board, while adopting the Third Circuit's distinctions, seems to have applied just such an interpretive gloss to them by implicitly holding that the inquiry ends once it is found that the disputed levy has a "special purpose"—meaning, strictly, a purpose other than maintaining the union in its "capacity as a collective-bargaining agent." Indeed, as I discuss below, before reaching its conclusion that the "working dues" there in question were not "periodic dues" under the NLRA, the Board seems to have coated the distinctions in *Food Fair* with at least two layers of gloss.

In *Teamsters Local 959,* the Board was confronted with a union which, after authorization from its membership, had "incorporated" into its "general dues structure" a 10-cent-per-hour increase in the members' "working dues."[61] The additional 10 cents was to be used to finance a credit union fund and a building fund. The Board found that the 10-cent portion of the working dues were "not 'periodic dues' as that term is used in the proviso to Section 8(a)(3) of the Act[,]" and the Board thus concluded that when the union "threat[ened] to enforce the

[58] See, e.g., *Green Team of San Jose*, supra, 320 NLRB at 1005 (one-time death and illness assessment); *Teamsters Local 439 (Shippers Imperial),* 281 NLRB 255, 258 (1986) (one-time charge for union building fund); and *Plumbers Local 81 (Morrison Construction Co.)*, 237 NLRB 207, 210 (1978) (one-time levy for "emergency" needs in anticipated strike).

[59] In more than 30 years of experience in administering the NLRA at the ground level, I can't recall ever seeing a union bylaw or a provision in a collective-bargaining agreement that refers to "periodic dues" (except, possibly, in the context of parroting the statutory language itself). Nor can I recall ever hearing anyone who lives in a "union" milieu (a union representative, say, or an employee represented by a union, or an employer who has union dealings) using the expression periodic dues as part of his or her "usual or ordinary" speech.

[60] Before natural scientists and ordinary people were as familiar with the variety of forms of life in the world as they are now, the "usual and ordinary understanding" among both groups may well have been that the bilateral "wings" used by members of the avian order—birds—existed for the "purpose" of enabling flight through the air. However, when Antarctic explorers brought back the first specimens of penguins, whose bilateral wings are useless for flying through the air, but have a different, or "special" purpose—propelling and controlling the animal's maneuvers under water—this did not cause the scientists nor more ordinary people to deny the "birdness" of penguins; much less did members of either group find it necessary to come up with a word other than wings to describe the penguins' bilateral appendages. Rather, they were simply forced to acknowledge that, despite the hitherto-presumed "usual and ordinary" purpose for wings, penguins were, taxonomically speaking, still birds, and their wings were, indeed, still wings.

[61] 167 NLRB at 1043.

unlawful [*sic*] provisions by requesting the discharge of employees refusing to pay them [*sic*], such threats violated Section 8(b)(1)(A)."[62] In reaching this conclusion, the Board, although quoting the above passage from *Food Fair* in full, used italics to emphasize the same phrases that I have likewise emphasized, supra. Then, implicitly treating the emphasized phrases as having independent significance, the Board found that,

> [m]onies collected for a credit union or building fund, *even if regularly recurring, as here,* are obviously not 'for the maintenance of' the Respondent, but are for a 'special purpose' and could be terminated without affecting the continued existence of the Respondent as the *bargaining representative*."[63]

Moreover, in a separate but clearly-related passage, the Board explicitly narrowed the Third Circuit's conception of "periodic dues" as being "for the maintenance of the organization" by holding that "it is manifest that dues that do not contribute, and that are not intended to contribute, to the cost of operation of a union *in its capacity as a collective-bargaining agent* cannot be justified as necessary for the elimination of 'free riders'. . . and they therefore do not fall within the proviso to Section 8(a)(3) of the Act."[64] Clearly, therefore, the Board's discussion in *Teamsters Local 959* introduced into the dues-*versus*-assessments analysis the notion that even if a union's "dues structure" requires members to make "regularly recurring" payments of specified amounts, these "periodic dues" will not qualify as "periodic dues" within the intention of the NLRA if they have a "special purpose"—specifically, a "purpose" other than "contributing to the cost of operation of a union *in its capacity as a collective-bargaining agent.*"

The proposition engrafted onto the analysis by the Board in *Teamsters Local* 959—that periodically-required "dues" payments for a "special," nonbargaining "purpose" are not "periodic dues" within the contemplation of Congress—is itself a debatable one. Thus, the proposition appears to assume that when Congress amended the Act to include references to "periodic dues," it supposed that unions which required "periodic dues" from their members had only one *legitimate* "purpose" for such dues—to support the union in its capacity as the members' collective-bargaining agent—and, therefore, any "dues" collected periodically from members for any *other* purpose would be outside the customary and legitimate purposes for which unions collected "periodic dues," and could not lawfully be collected under a union-security clause. And as I discuss next, similar objections seem to have animated the Board's later decision in *Detroit Mailers*, where the Board clearly rejected not just the lead proposition itself, but the assumptions that apparently informed it.

In *Detroit Mailers,* the Board was confronted with a union whose members were required by the constitution of the union's parent body, the ITU, to pay what the Board called "regular dues" that included two special-purpose amounts that were in dispute in the case because the union had invoked the union-security clause against members who refused to tender them: (1) an amount calculated at "2-1/2 percent of gross earnings," used "for the establishment and maintenance of an old age pension and mortuary fund," (actually "separate but related" funds that the ITU had separately "administered" for more than 50 years); and (2) a "monthly per capita tax of $1 [a disputed] half (50 cents) of which goes to a union printers home fund."[65] The Board further found, (a) that "[m]oneys from the 2-1/2 percent levy are allocated to the mortuary fund so that it is maintained at a level of $1 million and all additional amounts go to the pension fund"; (b) "the union printers home fund is administered by a. . . corporation and is apparently financed solely out of the portion of the per capita tax allocated to it"; and (c) that "moneys from the pension and mortuary funds . . . are available to the ITU for emergencies," including amounts of up to $1 million that may be "transfer[red] . . . to one or more of the general, operational, or strike funds of the ITU 'to maintain the integrity of this organization[,]'" which transfers the ITU "regard[s], internally, as noninterest-bearing loans," and which, "as a matter of practice, are usually repaid to the funds from which the transfers originated."[66] The Board noted that the "Trial Examiner," relying on *Teamsters Local 959*, "concluded that the disputed portions of the dues and per capita tax are not 'periodic dues' which may be required under the union-security agreement [because] . . . the pension and mortuary funds and the printers home funds are special purpose funds which are not related to the cost of collective bargaining[,]" and, therefore, "that making the payment of these levies a condition of employment violated Section 8(b)(2) and 1(A) of the Act." However, the Board (Member Jenkins dissenting) did "not agree" with the Trial Examiner's analysis and dismissed the pertinent allegations of the complaint.

The nature of the Board's disagreement with the Trial Examiner's analysis under *Teamsters Local 959* is instructive. This is what the Board said [emphasis added; footnotes and citations omitted]:

> Section 8(a)(3) authorizes a union to require all employees whom it represents and who are covered by a valid union-security agreement to pay all "periodic dues. . . uniformly required as a condition of acquiring or retaining [union] membership." Neither on its face nor in the congressional purpose behind this provision *can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union.* As recognized by the Supreme Court in the *Schermerhorn* case, "dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining.' Unions 'rather typically' use their membership dues 'to do those things which the members authorized the union to do in their interest and on their behalf.'" By virtue of Section 8(a)(3), such dues may be required from an employee under a union-security contract *so long as they are periodic and uniformly required and are not devoted to a purpose which would make*

[62] Id. at 1045.
[63] Ibid (emphasis added).
[64] Id. at 1045 (emphasis added).
[65] 192 NLRB at 951.
[66] Ibid.

> *their mandatory extraction otherwise inimical to public policy.*[67]

I note that the Board did not disagree with the Trial Examiner's characterization of the funds for which the disputed dues amounts were earmarked as "special purpose funds." And clearly, by all yardsticks applied in this legal area so far, those funds (like the MRP fund here) *were* special-purpose funds—"administered" separately by the ITU from its "general, operational, or strike funds"; maintained and accounted for separately from those other funds, and with stated limitations (however elastic or indefinite) on their use and their "transferability." Neither did the Board find it necessary to construe the disputed dues as being required to maintain the union's ability to function in its collective-bargaining role. Rather—and significantly—the Board clearly held that, despite the special purposes for the disputed dues amounts, they still qualified as "periodic dues . . . uniformly required" under the NLRA, and, where there was no basis for finding that their purpose was "otherwise inimical to public policy," they were lawfully enforceable under the terms of the union-security agreement.

On brief, the General Counsel states accurately that "the Board has never reconciled the approaches taken in *Teamsters Local 959* and *Detroit Mailers Union.*"[68] However, in the more recent *Seattle Times* case,[69] which I think the General Counsel has misconstrued in a pertinent respect, the Board appears to have pointedly disavowed reliance on any "special-purpose" rationale, and to have instead relied primarily on the lack of "periodicity" to the "membership dues" there in question.[70] Moreover, the reason for the Board's failure thus far to "reconcile" these "approaches" may be that they are "hopelessly irreconcilable," as noted by Judge Shapiro in *Seattle Times,*[71] by the D.C. Circuit in its own appellate review and remand of that case to the Board for a "coherent reconciliation of its own precedent,"[72] and, implicitly, by the Supreme Court itself, which, in *Beck,* characterized *Detroit Mailers* as having "repudiated" the rationale of *Teamsters Local 959.*[73]

C. Which "Test" Applies to this Case?

As I noted at the outset, the General Counsel argues on brief that "the Board should abandon" the tests in *Teamsters Local* 959 and "should adopt" instead as the "sole test" the more liberal standards stated in *Detroit Mailers*, but fails to explicate *why* the Board should prefer the latter over the former, and avoids entirely any discussion of how the Supreme Court's teachings in *Beck* might bear on the same question. By contrast, the Respondent's counsel, who agrees with the General Counsel that *Detroit Mailers* should control, at least suggests a reason for this—that *Detroit Mailers* "overrule[d] *sub silentio* that part of *Teamsters Local 959* which held that 'periodic dues' could only be used for collective bargaining purposes."[74] Moreover, unlike the General Counsel, the Respondent has confronted the question of *Beck*'s possible implications, and has argued plausibly (and with indirect support from the Board in *Big V Supermarkets*, supra), that *Beck*'s teachings do not apply where, as here, the facts do not present questions as to the rights of "non-members" who may "object" to paying MRP dues.

It is presumably appropriate for the General Counsel to advocate to the Board which of these authorities "should" be followed, if either of them, and even to argue (although he has not done so here) that the *earlier* authority deserves greater respect than the later one. However, the Board's administrative law judges perform an adjudicative function, not an advocative function, and in our adjudicative role we are not free to pick and choose among conflicting holdings based simply on which holding strikes us as the wisest one. Rather, we are bound by the Board's general admonition to its judges in *Waco, Inc.,* 273 NLRB 746, 749, fn. 14 (1984), as follows:

> We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. *Iowa Beef Packers,* 144 NLRB 615, 616 (1963). It is for the Board, not the judge, to determine whether that precedent should be varied.[75]

Here, I am persuaded that *Detroit Mailers* is the "established Board precedent" that I must apply, without regard to the Gen-

---

[67] 192 NLRB at 952.

[68] G.C. Br. at p. 20. Moreover, the General Counsel takes this statement one step further when noting elsewhere (id. at 22) that "these two tests are not reconcilable," and "because" of this, "it is the General Counsel's position that the Board should adopt [*Detroit Mailers*] as the sole test . . . and . . . should abandon the test enunciated in *Teamsters Local 959.*"

[69] *Pacific Northwest Newspaper Guild Local 82 (Seattle Times),* 289 NLRB 902 (1988).

[70] With respect to the *Seattle Times* holding, the General Counsel states on brief (p. 20, fn. 4) that the "Board found [a] strike defense fund to be an assessment where contributions were used for specific purposes (financing strike and lockout expenses). . . ." In fact, although Judge Shapiro included such "special-purpose" reasoning in his rationale (289 NLRB at 911-912), the Board "agreed with the judge's finding [on other grounds] that the increased portion of the membership dues here did not constitute 'periodic dues[,]'" but found it "unnecessary to pass on the judge's discussion of the standard to be applied in determining whether the purposes for which dues payments are expended will cause such payments to fall outside the definition of 'periodic dues[.]" Id. at 902, fn.1 (my emphasis). Seemingly, therefore, it was the lack of "periodicity" to the disputed "membership dues" that became the Board's rationale, and the basis for its holding in that case. (And see the subsequent history of Seattle Times, discussed below.)

[71] 289 NLRB at 911,fn. 16.

[72] Pacific Northwest Newspaper Guild v. NLRB, supra, 877 F.2d at 998, 1000-1002. In this regard, it appears that the Board found it unnecessary to respond to the Circuit Court's remanding order, for counsel for the General Counsel has represented on brief (p. 20, fn. 4) that, in the aftermath of the D.C. Circuit's remand, "the case . . . settled." And see R. Exh. 11, p. 5, fn. 8, in which the Office of the General Counsel said the same thing in a published Advice memorandum issued on July 8, 1993, in another case, where, strikingly, the General Counsel concluded that another local of the IBEW did not violate Sec. 8(b)(1)(A) or (2) when it relied on a member's checkoff authorization to collect from his wages certain portions of its "operating dues" that were earmarked for the local's job-targeting program.

[73] 487 U.S. at 752–753, fn. 7.

[74] R. Br. at p.20.

[75] See, e.g., *Architectural Glass & Metal Co*., 316 NLRB 789, 790 (1995).

eral Counsel's views as to its preferability. Thus, in essential agreement with the Respondent, I find that, because the Board's rationale for dismissing the complaint in *Detroit Mailers* is irreconcilable with the rationale of *Teamsters Local 959, Detroit Mailers* must be understood as having effectively "overruled" *Teamsters Local 959,* even though the *Detroit Mailers* majority did not say so explicitly, but instead merely "distinguished" the prior case on its facts. Moreover, I see nothing in the Board's decision in *Big V Supermarkets*, supra*,* that clearly suggests that the Board would disavow the *Detroit Mailers* rationale in the aftermath of *Beck.* On the contrary, in its "on the one hand . . . on the other hand" footnote in that case, the Board appears to have said at least this much: (a) *Detroit Mailers* states the governing Board law, subject only to the possible impact of *Beck*; and (b) *Beck* did not *necessarily* "reverse" the rationale of *Detroit Mailers* insofar as it may apply, as in this case, to a union *member's* rights or duties when it comes to the payment of special-purpose dues that are periodic and uniformly required. And again, where the Board itself has not yet conclusively assessed *Beck*'s impact on the "difficult question," I do not feel free to weigh-in with any views I might have on the matter; rather, I am bound to apply *Detroit Mailers* unless or until the Board itself "determine[s] to "var[y]" from that "precedent." [76]

Accordingly, with these understandings as my guide, I will proceed next to examine the General Counsel's further contention that MRP dues do not qualify even under *Detroit Mailers'* more liberal standards as "periodic dues . . . uniformly required."

D. Application of Detroit Mailers to Mulcahy's Treatment in June-July 1995

Even though the General Counsel urges the Board to "abandon" the test used in *Teamsters Local 695,* and to "adopt" instead as the "sole test" the one declared in *Detroit Mailers,* the General Counsel inexplicably devotes considerable attention on brief to those features of this case that might invite a finding under *Teamsters Local 695* that MRP dues are "special-purpose" dues.[77] These features are too obvious to require recapitulation. MRP dues clearly may be characterized as special-purpose dues; however, the important point is that *Detroit Mailers* treats such a characterization as irrelevant, in itself, to the question of the union's right to collect such dues under a union-security clause. Rather, as thoroughly discussed previously, *Detroit Mailers* held that even special-purpose dues that are both "periodic" and "uniformly required" may lawfully be collected under a union-security clause unless their "mandatory extraction" will be "otherwise inimical to public policy."

Moreover, when the General Counsel finally turns to the question of the applicability of *Detroit Mailers* to the facts of this case*,* the prosecution devotes all but a single brief passage (identified below) to her "primary" theory—that MRP dues are "inimical to public policy" (because the WAB said in its 1991 decision that the *deduction* of such dues by employers on Davis-Bacon jobs violates the "without subsequent deduction or rebate" proscriptions of the Davis-Bacon Act, and is not saved by DOL regulations that permit the "deduction" of "regular union . . . membership dues.") However, for reasons I have noted previously, the legality of Mulcahy's treatment at the Respondent's hands when employed by Kingston in June-July 1995 is the only question the Board was shown to have jurisdiction to adjudicate, and the Respondent's treatment of Mulcahy in that instance clearly does not implicate any such Davis-Bacon concerns. (Why? Because the Respondent's actions against Mulcahy in that instance were based on his MRP dues-delinquencies accrued while working earlier for Excalibur on a job that was not covered by the Davis-Bacon Act.) Indeed, the General Counsel implicitly acknowledges this when arguing (under *Teamsters Local 695)* that MRP dues are for a "special purpose," and are therefore "assessments," and that "this rationale would apply to such jobs as the Excalibur job worked by Mulcahy which was a state rather than a Federal Davis-Bacon job, and to all privately funded jobs."[78]

There is an obvious objection to the latter contention: The General Counsel has elsewhere urged the Board to "abandon" the very "rationale" invoked in this passage (i.e., the rationale of *Teamsters Local* 695) when it comes to the collection of MRP dues-delinquencies arising on jobs *not* covered by the Davis-Bacon Act. And it is therefore apparent that the prosecution is either equivocating when it comes to identifying the alleged vice in the Respondent's treatment of Mulcahy in June-July 1995, or is simply wasting its breath by emphasizing at length the "special-purpose" character of MRP dues under circumstances where this will not matter to the analysis under *Detroit Mailers,* whose "test" the General Counsel elsewhere urges the Board to "adopt" as its "sole test."

Once again: Exactly why does the General Counsel find under *Detroit Mailers* that the Respondent's treatment of Mulcahy in June-July 1995 was unlawful? Remarkably, even though Mulcahy's treatment by the Respondent when employed in that period by Kingston was the trigger for his original charge, and became the target of two of the four substantive counts in the complaint that issued 13 months later, and even though the particulars of Mulcahy's treatment in that instance were litigated far more closely than any other matters vaguely alleged in the complaint, you still have to squint to locate the answer to this question among the many other arguments in the prosecution brief that have nothing to do with it. The answer appears as almost a throwaway line preceding the General Counsel's more lengthy exposition of her "primary theory" under *Detroit Mailers* ("inimical to public policy" in the light of the 1991 WAB decision). The answer appears in a passage that begins with this

[76] Neither, in the current unsettled state of Board law as to the impact of *Beck* on these questions, may I rely on dicta appearing in the D.C. Circuit's decision in *Reich*, supra, suggesting that, under *Beck*, dues amounts collected by unions to fund JTPs cannot qualify under the NLRA as "periodic dues . . . uniformly required." 40 F.3d at 1281–1282. And in this regard, I note that the Board's admonition to its judges in *Waco, Inc*. supra, arose under circumstances where the Board found that "the judge improperly relied on courts of appeals decisions instead of initially considering relevant Board decisions on the issues presented." 273 NLRB at 749 fn. 14.

[77] See G.C. Br. at p. 20, second full paragraph, to p. 22, preceding first full paragraph.

[78] Id. at *22,* top of page.

statement: "In applying the *Detroit Mailers Union* test it is undisputed that MRP moneys are periodic and uniformly required of all members working under the Inside Agreement." Then, after noting that MRP dues are not required of certain *other* classes of the Respondent's members (i.e., those who work in, inter alia, "the smaller specialty bargaining units such as marine, sound and electronic techs"), counsel for the General Counsel finally addresses the pending question more or less head-on. Here is what she says (emphasis added):

> It is . . . asserted that because this 3.5% of gross wages, market recovery amount is not *uniformly required of all members of Local 48*, that it is, therefore, an assessment rather than dues. Under that theory Local 48 violates Section 8(b)(1)(A) and (2) when it attempts to collect MRP money under threat of discharge for hours worked on *any* job.

Obviously, the prosecution is on firm statutory ground, and is well supported by the caselaw (including *Detroit Mailers*) to the extent it argues that union "dues" must be both "periodic" *and* "uniformly required" before a union may seek to collect them "under the threat of discharge" pursuant to a union-security clause. And what the General Counsel appears to be saying, finally, is that MRP dues, although "undisputed[ly] periodic and uniformly required of *all* members working *under the Inside Agreement*," are *not* "required" of *all* of the persons whom the Respondent admits to "membership." In short, the General Counsel is saying in the end that the problem with MRP dues under the NLRA is not their lack of periodicity, but the fact that they are not "uniformly required."

This particular theory was not even hinted at in the complaint nor in counsel for the General Counsel's opening statement at trial, when she outlined the General Counsel's prosecuting theories in terms that are otherwise roughly consistent with her arguments on brief. That aside, I find it striking that the General Counsel has cited no Board precedent in support of this theory, but apparently relies only on certain *dicta* in the Ninth Circuit's *Brock* decision, *supra*—and then the General Counsel merely mentions these *dicta* incidentally, in the context of a separate discussion of the public-policy implications of the 1991 WAB decision under the Davis-Bacon Act.[79] In fact, however, as noted by the D.C. Circuit in its review and remand of *Seattle Times,* supra, the *Board* does not appear to have found it disqualifying that a union's "dues structure" may be "variable" in its impact on different classes of "members," i.e., where dues amounts imposed on members will vary according to their earnings and whether or not they are "working at the trade," and in which, as herein, some members are exempted from the disputed dues amount because their particular jobs fall outside the particular "trade" in which most of the members customarily work.[80]

Here, the Respondent's dues structure is "variable" in the same (innocuous) sense, but MRP dues are no less "periodic dues . . . uniformly required" because of that variability. The dues amounts will vary depending not only on each member's particular employment status and rate of pay, but on whether or not the member is working within the Respondent's territorial jurisdiction under the Inside Agreement. Indeed, we can properly notice that *most* unions' dues structures are likewise "variable," and that the dues amounts that most unions require of their members will often likewise vary depending on the particular labor agreement "under" which a given member happens to be working during any given period of dues-accounting. Therefore, if the General Counsel's theory in this instance is taken seriously, there will be few, if any, unions whose "periodic dues" will qualify as "uniformly required" under the NLRA, and thus few, if any, unions who may lawfully exercise the rights under a union-security agreement that Congress expressly conferred in the respective *provisos* to Sections 8(a)(3) and 8(b)(2). I cannot so lightly impute to Congress such an intended result, much less could I embrace such a result in the absence of Board authority that clearly supports this theory, and the General Counsel has cited none. Rather, lacking Board authority to the contrary, I would interpret the statutory phrase "uniformly required" as calling for the equal treatment of members who are *similarly situated* in terms of their employment status, their rate of pay, and the particular labor agreement under which they may be working in any given period—i.e., as a *guard* against the arbitrary or invidious imposition of "dues" on only certain members without regard to such considerations of equality of status. Thus, where the nominal lack of "uniformity" in the Respondent's application of its MRP dues requirement traces simply from the fact that some of the Respondent's members are exempt from the MRP dues requirement when they don't work under the Inside Agreement—and necessarily

[79] Id. at 17. Here, the General Counsel states that the Ninth Circuit's *Brock* decision held, inter alia, that the 2-percent market recovery dues required of "travelers" in that case do "not qualify as 'membership dues' within the meaning of 29 C.F.R. § 3.5(i) [of DOL's administrative regulations]." And she notes, as well, that because only "members working under Local 357's 'inside' . . . agreement were required to pay the 2% assessment in addition to their working dues," the circuit *also* "found that the assessment was not 'uniformly required,' and thus the assessment did not constitute 'membership dues' within the meaning of 29 C.F.R. Section 3.5(I)." I think the General Counsel is here referring to a passage near the end of sec. II, 3, of the *Brock* opinion, where the Ninth Circuit *actually* was discussing the D.C. Circuit's "rejection" in *Reich,* supra, of "union contentions that interpretations of the term 'periodic dues,' taken from the [NLRA] context, are relevant in determining whether JTP assessments are 'membership dues' under Davis-Bacon Act regulations." And it is true that, in the course of agreeing with the D.C. Circuit that NLRA interpretations are not "relevant" to the matters in dispute under the Davis-Bacon Act, the 9th Circuit nevertheless gratuitously opined that "the JTP assessments . . . are not 'uniformly required' [under NLRA Section 8(a)(3)]" because "only those IBEW workers . . . working under an 'inside' . . . agreement are required to pay the two percent assessment in addition to their Working Dues." 68 F.3d at 1203.

[80] See discussion in *Pacific Northwest Newspaper Guild v. NLRB,* supra, 877 F.2d at 1001–1002, especially the circuit's discussion of *Local 409, Stage Employees IATSE Local 409 (RCA Service Co.),* 140 NLRB 759 (1963), where IATSE members were "considered to be 'working at the trade' [and thus subject to the disputed 1.5 percent working-dues increment] if they were engaged in work that fell within the 'work jurisdiction' of the union [such as] "projectionists, operators or sound technicians,]" but that "a member employed solely as a checker in a supermarket was not required to pay the percentage levy." 877 F.2d at 1002 fn. 5, citing 140 NLRB at 761.

don't derive any benefit from the operation of the Market Recovery Program when not working under the Inside Agreement—I judge that this phenomenon does not disqualify MRP dues as "periodic dues . . . uniformly required." If the Ninth Circuit has opined to the contrary in *Brock,* it did so in a case that was decided strictly in terms of that Circuit's understanding of the Davis-Bacon Act and the related regulations of the Department of Labor; therefore, its opinion as to the meaning of the expression *uniformly required* under the NLRA is classic *obiter dicta* even within the framework of the *Brock* decision. Neither can such dicta control my analysis, especially where the Board itself has never, so far as I can tell, interpreted the phrase "uniformly required" in the manner suggested in *Brock,* nor in the manner now urged by the General Counsel.

In sum, I find, applying *Detroit Mailers*, that the MRP dues accrued by Mulcahy on the Excalibur job were, indeed, "periodic dues . . . uniformly required" under the NLRA. It necessarily follows as a matter of law that when the Respondent, in June-July 1995, invoked rights under the union-security clause of the Inside Agreement to have Kingston dismiss Mulcahy, its "threatening to cause and causing" Kingston to fire Mulcahy violated neither Section 8(b)(2) nor Section 8(b)(1)(A).

[Recommended Order for dismissal omitted from publication.]